

TREATISE

OF

MUTILATION and DEMEMBRATION

Divided in two PARTS.

In the first whereof, the Name and Nature of these Crimes, and of *Proper* and *Improper Members* of the Body, are unfolded : The Doctrine of *Canonical Regularity* and *Irregularity*, from which that Distinction in order to Crimes descends, explained : Also the Method of pursuing and defending in these Crimes ; the Competency of the Judge ; the Order of Probation ; together with the Procedure of the Inquest, is set down.

In the second PART, the Punishments of these Crimes are handled ; *Retaliation*, which is the first of them, distinguished ; and the Practice of that *Species* thereof called *Pythagorical* or *Arithmetical*, refuted ; from the Opinion of Divines and Lawyers ; and even from the Opinion of the *Rabbies* : The other *Species* called *Aristotelical*, *Analogical* or *Geometrical*, reconciled to natural Equity, and to the Law of GOD. The Punishment of *Amputation of a Hand*, though in many Cases practised, yet, rejected from being the ordinary Punishment of these Crimes. *Arbitrary Punishments* asserted in place of both ; and a well regulated Arbitrary Power prov'd to be useful and necessary to Judges, for augmenting and diminishing Punishments, in these and in other Crimes, according to Circumstances attending the committing of them. And in both Parts the *Civil Law*, and the *Law and Customs* of this and other Nations are compared.

By Sir ALEXANDER SETON of PITMEDDEN Knight Baronet, &c.

By way of Appendix to the fore-going Book, written by the Learned Sir GEORGE MACKENZIE of Rosehaugh.

E D I N B U R G H,

Printed by the Heirs and Successors of Andrew Anderson, Printer to the King's most Excellent Majesty. For Mr. Andrew Symson ; and are to be Sold by him in the Cowgate, near the Foot of the Horse-wynd, Anno DOM. 1699.

ERRATA.

The Letter *N.* relates to the Number in the Margin, and the Letter *L.* to the Line of the Number.

Num. 1. Line 4. *f.* likely *r.* like N. 4. l. 23. *f.* *jaſſurum* *r.* *jeſſurum* N. 6. l. pen. *f.* *Duſilatus* *r.* *Muſilatus* N. 7. l. 9. *f.* *ipſu* *r.* *ipſus*. N. 19. l. 1. *f.* irregular *r.* regular N. 20. l. 6. to *Dionys.* add *Halie.* N. 24. l. 15. *f.* *excacuerit* *r.* *excacaverit* l. 17. *f.* *lib.* 12. *r.* *lib.* 22. l. 18. after *Hiſt.* add *Cenſ.* 1. N. 37. l. 5. *f.* occasions *r.* affects N. 67. l. 7. after *Aſſize.* add But this muſt be upon ſome Speciality, and probably becauſe many difficulties occur in the Deciſion. N. 71: l. 12. *f.* of one other. *r.* one or another N. 100. l. 6. *f.* *Hugo* *r.* *Ugo*. l. 7. *f.* *ſaliſur* *r.* *ſaliſer* N. 105. l. 18. *f.* *Lucia* *r.* *Lycia*. N. 115. l. 4: *dele* it. N. 167: l. 25: *f.* *legem* *r.* *legum*. N. 170: l. 7: *f.* *honore* *r.* *am're*. As for any other literal Errors, or Miſtakes in the punctuation; the candid Reader is deſired to excuſe and amend them.

To the Reader.

WHen I gave the first of the following Sheets to Mr. *Andrew Symson*, that he might publish them, 'twas my Desire that my Name should be conceal'd, to the end that the Reader (being left to his Conjectures about the Author) might ascribe them to a person of greater Learning, whose Reputation in the World might add more Lustre to the Work than my obscure Name could do ; But the Publisher by some mistaken Apprehension having prefix'd my Name, has thereby oblig'd me to premit the following Account beyond what the Introduction contains, which was all the Preface I at first design'd.

The occasion of my Writing was this; Mr. *Symson*, Minister of the Gospel, having in the year 1689. retir'd to this City of *Edinburgh*, resolv'd, according to the Apostles advice (a) *to be quiet and to do his own business, and to work with his own hand*, that so (b) *he might not be chargeable to any*; but (c) *eat his own bread*; and (d) *have to give to him that needeth*. And in prosecution of this virtuous Resolution having taken himself to the Trade, he well understood, of publishing and selling of Books, desir'd from me and his other good Friends, to give him such Encouragement as might fall in our way.

Some of the Honourable Society of Advocats, Mr. *Symson's* Patrons and Benefactors, having advis'd him to publish a second Edition of the *Laws and Customs of Scotland in Matters Criminal*, written by the Learned Sir *George Mackenzie* of *Rosehaugh*; and he being desirous that this second Edition might go out with some Addition; I was prevail'd with, though unfit for the Undertaking, to write the following *Appendix*; and the Subject being left to my own choice, I pitched upon the Crimes of *Mutilation* and *Demembration*, as these on which least had been written, and yet afforded variety of Matter both profitable and pleasant, whereof I hope the Reader will be convinced, after he has perus'd these following Papers.

For Methods sake, I have divided this little Work in two Parts; In the first whereof (containing Matter *Medico-legal*) I have spoken of the Names and Nature of these Crimes, and shewen they can only be committed on *proper Members* of the *Body*; and from thence I have taken occasion to describe both *proper* and *improper Members*, and to show how far the distinction betwixt them, arose from the Doctrine of *Canonical Regularity* and *Irregularity*; I have likewise set down some general Directions for forming a *Lybel*, with the most remarkable Defences; and some Observations anent the Competency of the Judge; the Method of Probation; the Inquests their Procedure; intermixing now and then, with Citations of Law, some pertinent Passages of History, to divert the Reader.

In the second Part I have considered the Punishments of those Crimes; and have handled *Retaliation* (which is the first of them) as a matter *Historico-theologico-juridical*; and refuted the *Species* thereof, called *Pythagorical* or *Arithmetical*; and reconcil'd the other *Species*, called *Aristotelical*, *Analogical*, or *Geometrical*, to Natural Equity, and to the Law of GOD. And that for clearing a Debate in the Books of Adjournal about *strict Retaliation*. I have also discourst of the Punishment of *Amputation* of a Hand, and rejected it from being the ordinary punishment of those Crimes, and have asserted *Arbitrary punishment*

To the Reader.

ment to be the *Ordinary*; and described *Arbitrary punishment* in the *General*, and shoven how far a well regulated *Arbitrary Power* is useful and necessary in Judges; for satisfaction of some who are scandalized at the very Name of every thing call'd *Arbitrary*; and last of all, I have endeavour'd to clear the Sense of the ancient Statute of King *Robert the Second*, which declares the Life of the *Mutilator* to be in the Kings Will. All which is more particularly held forth in the *Summaries* prefixt to each Part, which, according to the Method of *Farinacius*, contain an Abridgment of the Heads they relate to.

In the performance of this Task, I have adduced the Testimonies of *Physicians*, *Divines* and other Authors, as the Subject of each of these Parts required, and have compar'd them with the Citations of *Civil Law*, and *D D.* and Decisions, in the Books of Adjournal, and have dispos'd them in such a Method as makes the Work altogether new, and yet no part of the *Criminal Law* needed more to be known, because the Crimes I treat of, have frequently occur'd, and must occur so long as the Wickedness of Man prompts him to Revenge.

These things being premitted concerning the Occasion and the Matter of the *Appendix*, I crave leave by way of *Apology* to represent; first, That when I enter'd upon this Task, I design'd to comprehend all I had to say, in six or seven Sheets; but one Thought following upon another, swell'd them to the Number they now appear in. Next, during all the time I was employed about these Sheets, I met with frequent Interruptions from a long and tedious *Sute of Law*, sufficiently known to be just on my part, where through I was obliged to give in every Sheet, as it was finished, to the Press, before I had time to digest another, to satisfy the Importunity of the *Printers* who frequently called for them: and this did so hasten and drive me, that I was forced to take Hours from my Sleep to Revise and Correct the Sheets. This *Precipitation* occasion'd some Literal Mistakes, and if even Errors in Matter should appear, (as I hope they will not) I may be allowed to excuse my self in these words

† *Probabil. lib. 1.*
c. 1. N. 1.

of the Judicious *Noodi*. † *quod nimia acceleratio saepe efficit ut Animus, dum pluribus intenditur, variet atque ad alia aberret quam sibi dicenda faciendave proposuerat*; providing I do frankly acknowledge the Errors how soon they shall be discovered; and this I not only promise to do, but also will think it my Honour,

(a) *l. fin. C. de instit. & substit.*

(b) *l. 14. C. de pract. min.*

(c) *l. 30. C. de fidei comm.*

(d) §. *sed quia* 7. *inst. de fidei comm. Hered.*

(e) *Novel. 4. c. 6. vers. sed & hoc.*

(f) *l. 6. §. 1. ff. de serv. export.*

(g) *l. 22. §. 3. C. de furt. et serv. cor.*

after the Example of the famous *Papinian*; who (though he was dignified in Law with the splendid Titles of *Disertissimus* (a) *prudentissimus* (b) *acutissimus* & *merito ante alios excellens* (c) *homo excelsi ingenii* (d); and last of all with the Title of *Maximus Papinianus* (e) yet thought it no Derogation to yield to the Arguments of *Sabinus*, and to become his Convert; *sed in contrarium* (says he, after stating his own Opinion) *me vocat Sabinus sententia* (f); and by so saying, to proclaim the Victory on *Sabinus* his side; and in another case *Justinian* cites him, changing his Thoughts, & approves the 2d. before the first (g); and justly, for Reason should not be ruled by the Will, but have the command over it; this being that noble Victory of a man over himself, commended by *Plato* calling it *pulcherrimum victoria genus*.

A
TREATISE
OF
MUTILATION and DEMEMBRATION
PART I.

WHEREIN the Name and Nature of these Crimes, and of *Proper* and *Improper Members* of the Body, are unfolded : The Doctrine of *Canonical Regularity* and *Irregularity*, from which that Distinction in order to Crimes descends, explained : Also the Method of pursuing and defending in these Crimes ; the Competency of the Judge ; the Order of Probation ; together with the Procedure of the Inquest, is set down. As also the *Civil Law*, and the *Law* and *Customs* of this and other Nations are compared.

By Sir *ALEXANDER SETON* of *PITMEDDEN* Knight Baronet, &c.

By way of *Appendix* to the fore-going Book, written by the Learned Sir *GEORGE MACKENZIE* of *Rosburgh*.



EDINBURGH,

Printed by the Heirs and Successors of *Andrew Anderson*, Printer to the King's most Excellent MAJESTY. For Mr. *Andrew Symson* ; and are to be Sold by him, in the *Comgate*, near the Foot of the *Horsec-mynd*.
Anno DOM. 1699.



A TREATISE

OF
MUTILATION & DEMEMBRATION,
(by way of *APPENDIX* to Sir George
Mackenzies Criminals:) Divided in-
to *Two Parts.*

PART I.

Wherein the Nature of the *Crimes* or *Delicts* of *Muti-*
lation and *Demembration* is Considered, Together
with the Method of *Pursuing* and *Defending*
therein.

Summaries.

- 1 Introduction, Shewing the Design of this APPENDIX.
- 2 Mutilation and Demembration, by some are treated of among Injuries, and notimproperly; by others in the Title of Murder: with the Reasons why.
- 3 This Treatat is divided into two Parts: The first Part treats of the nature of these Crimes or Delicts, together with the method of Pursuing and Defending therein. The second Part treats of their Punishments.
- 4 The several Acceptations of the Words Mutilation and Demembration, and of their Synonymous Words, Mutilum, Mutilatium, Curtum, Decurtum, Descissum, Detruncatum.
- 5 How the Word Mutilation is to be understood in Cap. 11. Stat. Rob. 2. and in our later Custom of Speaking.
- 6 Mutilation and Demembration are Names of Crimes: and one who wants a Hand, or other Members on other occasions, is not properly call'd Mutilatius or Demembratus, sed Mancus.
- 7 Mutilation and Demembration described and distinguished from Debilitation, which is the weakning of a Member, without taking away it's total use.
- 8 Mutilation (like Homicide) distinguished into Voluntary, Necessary, Casual, and Culpable.
- 9 Mutilation and Demembration are call'd Acts of Privat Violence, to distinguish them from Acts of Punitive Justice.

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10 Mu-

- 10 Mutilation, *why described by the Word Hurting, and not Wounding.*
- 11 Mutilation and Demembration being committed on Members, are thereby distinguished from Homicide.
- 12 The last Words of the Description of Mutilation [to that Degree that the Member ceaseth to be useful] hold forth, 1. That the hurt Member must be useful. 2. That it lose its use. 3. That it be irrecoverably lost.
- 13 This leads us to enquire what is a Member, because it's in some cases allc'd that the hurt part of the Body is no Member.
- 14 Members divided in principal and subservient, and both described.
- 15 And in proper and improper, and both described.
- 16 The action and use of a proper Member described.
- 17 Though Mutilation be described, by it's rendering a Member useless, yet it is not thereby confounded with Demembration.
- 18 The Canonists in their Discourses of Canonical Regularity and Irregularity, give light to the understanding of the nature of proper & improper Members.
- 19 Canonical Regularity and Irregularity described.
- 20 Some Defects in the Body are Causes of Canonical Irregularity in the Roman Church, as had been formerly under the Levitical Law; from whence that Custom seems to have ascended to the Heathen Nations; and last of all, came in to the Church of Rome.
- 21 Defects of the Body were either natural or accidental; and among other Accidents, were occasioned by the Crimes of Mutilation and Demembration, which sometimes rendered the Agent, and sometimes the Patient, and sometimes both, irregular.
- 22 A Rule taken from the Doctrine of the Canonists anent irregularity, whereby to know when Mutilation and Demembration is committed, in order to infer Punishment.
- 23 Of Members in particular; where, First, It's prov'd that the Eye is a proper Member.
- 24 A man may be demembred of his Eyes two ways: First, Formaliter, by having them designally pull'd out; which atrocious Crime hath been punish'd by Retaliation.
- 25 Also a man may be demembred of his Eye, by it's being wounded to that degree, that it withers or consumes, and such a man is said to be mutilated Substantiviter.
- 26 The Eye may be mutilated, either by a total abolition of the Sight; or by such a diminution as renders the Sight almost useless: which is describ'd and illustrated by Examples.
- 27 Depravation of the Sight as describ'd, infers not Mutilation.
- 28 The Tongue prov'd to be a Member in the proper Sense.
- 29 The Tongue is said to be demembred, when cut out by the Root.
- 30 The Tongue is said to be mutilated, when such a part of it is cut off, as hinders it to speak to Understanding, although the Law will hold him *sanus* as to Retribution.
- 31 Whether the Lips be Members in a proper Sense.
- 32 Whether the Teeth be Members in a proper Sense? Arguments for the Negative.
- 33 Arguments for the Affirmative.
- 34 Arguments for the Negative Answered.
- 35 The Nose is a member in the proper Sense, prov'd by Authorities.
- 36 It's prov'd by Experience, which teaches that it is the only Instrument of Smelling.
- 37 An Objection Answered.

- 38 Those who deny the Nose to be the Instrument of Smelling, do acknowledge it to be the Instrument of other distinct Operations; and consequently a Member in the proper Sense.
- 39 The Ear describ'd: And distinguish'd in Internal, call'd Auris; and External, call'd Auricula. The first yielded to be a Member in the proper Sense, and the second controverted.
- 40 Physicians and Lawyers for the Negative.
- 41 Physicians and Lawyers for the Affirmative.
- 42 Suarez and Zacchias agree to the Affirmative, hic & N. seq.
- 43 If Amputation of a part of the Auricula, infers Demembration; Asserted by Suarez, Deny'd by Zacchias, and so dec'd.
- 44 The Chin no proper Member according to Farinacius; and therefore the cutting off of the Chin infers not Demembration, but yet is punishable as a Delict or Riot.
- 45 The Beard is no Member, yet the cutting off thereof against the Owners will, is severely Punishable, even *pæna incidentis membrum*, according to Baldus.
- 46 The Paps or Duggs of a Woman are Members in a proper Sense.
- 47 Whether or not the Spondyls or Vertebrae be Members in a proper Sense.
- 48 Castratio virilium is a most atrocious Demembration, and severely punishable, hic & N. infra.
- 49 The Hand, how taken in a large Sense, and how in a narrower Sense.
- 50 The Hand, because it performs most useful & distinct Operations, is without all Debate, a most useful and proper Member.
- 51 The Leg is also an useful and proper Member.
- 52 Whether the Fingers and Toes are Members per se, or only parts of the Hands and Feet is not agreed among the DD.
- 53 For the Negative, viz. that *Digitus non est Membrum*, are Bartolus, Baldus, and many others, both Lawyers and Physicians.
- 54 Fr. Suarez seems to agree with the Negative.
- 55 Cajetan and Soto are for the Affirmative.
- 56 Suarez acts the part of a Reconciler betwixt Cajetan and the other DD.
- 57 *Digitus* found to be Membrum, by many Decisions in the Books of Adjournal.
- 58 Arguments to justify the Decisions.
- 59 Whether it be more proper to say, the Fingers are demembred, or the Hand is demembred of the Fingers, according to Fortunat. Fidel.
- 60 Answers to some Laws adduced by the DD. to prove that the Fingers are no Members.
- 61 The Toes or *digiti pedis* are properly Members, as the Fingers of the Hand, because of their usefulness.
- 62 Wonderful Performances done with the Toes of such as have been Born without Hands.
- 63 Detruncation of a Withered Hand, infers the Crime and Pain of Demembration.
- 64 The cutting off of a proper Member from a dead Body, doth not infer the Crime or pain of Demembration.
- 65 The use of this Discourse of proper and improper Members, is for the understanding of general Statutes concerning Members.
- 66 All Judges competent in Homicide, are likewise competent in the Crimes of Mutilation and Demembration.
- 67 Barons of Barony are not competent Judges, neither is the Privy Council.
- 68 Though the Privy Council cannot decide, yet they can recognise, and discharge the Justices to proceed.

- 69 *Five Cautions for forming the Libel.*
- 70 *The Defences are dilatory, or peremptory; and both described.*
- 71 *The first dilatory Defence against Mutilation is, that Year and Day is not elaps'd since the committing of the Crime; with the Reply thereto.*
- 72 *This Defence takes no place against a Libel of Demembration.*
- 73 *If the Pursuit be both for Mutilation and Demembration, the Pursuer may pass from the Mutilation, and Insist within Year and Day for the Demembration.*
- 74 *The second dilatory Defence is, that the Case is submitted.*
- 75 *The first peremptory Defence is, that the mutilated Member is recovered.*
- 76 *The Defence of Recovery, is only relevant against a Libel for Mutilation.*
- 77 *The second peremptory Defence is, that the Case being submitted, the Arbiters have decerned.*
- 78 *The Justices oft-times recommend to the Parties to submit.*
- 79 *Mutilation and Demembration, are but privata delicta.*
- 80 *The third peremptory Defence is, that the King has remitted the Crime.*
- 81 *The fourth peremptory Defence is, Dissimulation: but this must be very apparent and evident, otherways it's not relevant.*
- 82 *The fifth peremptory Defence is, Res judicata.*
- 83 *The sixth is a good Defence, that the Council have precognosc'd and discharg'd the Justices to proceed.*
- 84 *Sometimes the Council remit to the Justices to precognosce.*
- 85 *The seventh Allegiance of Self-Defence is relevant here, as in Homicide.*
- 86 *Self-Defence is not relevant against one clothed with lawful Authority.*
- 87 *The eighth is a good Defence that the Wound was Curable, and the Mutilation or Demembration was ex malo regimine.*
- 88 *All who are Actors Art and Part, are lyable.*
- 89 *Whether it be a good Defence that the Party mutilated or demembred was at the Horn.*
- 90 *A Pannel at the Horn, must relax before he can be allowed to propone his Defences.*
- 91 *If strict Retaliation be crav'd in the Libel, the Pannel must debate how far the Jewish Retaliation is obligatory.*
- 92 *It is a good Defence that the Pursuer did Mutilat or Demember himself.*
- 93 *Whatever Defence is competent against Homicide, is also competent against Mutilation and Demembration, mutatis mutandis.*
- 94 *Two things to be noticed in the Probation of these Crimes or Delicts.*
- 95 *1. What's evident to the Judge and Inquest by Ocular Inspection, needs no further Probation.*
- 96 *2. If Mutilation be only pretended, then the Trial must be either by the Oath of Calumny of the Party pretending to be Mutilated; or by Witnesses; or by Skillful Chirurgeons, who must declare their Opinion upon Oath.*
- 97 *The Testimony of Physicians and Chirurgeons, is not probative, unless upon Oath, which is agreeable to the Opinion of the DD. and the Practice of Forraign Courts. Three Cases wherein they not obliged to Swear.*
- 98 *Assisers should be persons more than ordinary intelligent. It's also necessary that Advocats study the Questiones Medico-Legales.*

Of Mutilation and Demembration. 5

THe design of this Appendix is, to treat of *Mutilation and Demembration* omitted by the learned Author of the foregoing Book. And if the worthy Gentleman had liv'd to favour his Countrey with a second Edition; it's likely he would have enlarged upon the whole Titles of his Book; and saved me the pains of this Addition, by writing on it to better purpose.

This Subject is handled in the Title of *Injuries*, by *P. Herodius. rer. judicat. 2 lib. 6. tit. 5. cap. 20. Matthæus de crim. tit. 4. cap. 2. Carpz. prax. crim. p. 2. qu. 99. N. 25. Wesenbecius & Zoes. ad tit. ff. de injur.* and by many others; and even by the Text it self. §. 7. *inst. de injur.* And it cannot be denyed, but to cut off, mutilat, or disable a necessary Member of the Body, is one of the greatest Injuries that can be done to it; for not only doth it deform the Body, but renders it unfit for Action; and in many places makes the injured person incapable of the Office of the *Priesthood*, as we shall shew, N. 20. *infra*: So that these Crimes or Delicts are very properly handled in the Title of *Injuries*. Yet others, as *Covarruv. relit. de Homicid. Farin. prax. crim. 4. 119. tit. 4. inst. 4. and Zoes. ad tit. ext. de homicid.* treat of them, in the Title of *Homicide or Murder*: as our Author very properly calls it; and these Reasons may serve to justify them. First, Because the sixth Command, *Thou shalt not kill*, *Exod. 20. 13.* prohibits these Injuries as Degrees of *Homicide*, and for this cause the political Sanctions added *cap. 21.* to explain and defend that Command, first of all declare the several cases of *Homicide* from *vers. 12. to vers. 24.* and then the cases of *Mutilation and Demembration, v. 24. and 25.* making this proportion betwixt the Punishments, that as Life must go for Life, so Eye for Eye; Tooth for Tooth, Hand for Hand, Foot for Foot. Secondly, These Crimes, because of their Similitude and Relation to one another, have many common Rules for judging them, which seems to be the Reason why they are conjoyned in our ancient Laws and Acts of Parliament; as *cap. 11. stat. Rob. 2. And Act 28. Par. 3. Ja. 4. and Act 118. Par. 7. Ja. 5.* But, this Controversie being of no moment, the Reader may append this small Treatise either to the Title of *Murder* or of *Injuries*, as he pleases.

I have divided this little Tractat in two Parts; In the first, I consider the Nature of these Crimes or Delicts, together with the Method of pursuing and defending in them. In the second, I consider their Pains and Punishments. The Matter of the first Part is, *medico-juridical*; and, for this cause, the Physicians and Lawyers have been mutually assisting to each other. And the cases resolved by them, are called, *Quæstiones medico-legales*. This Subject is useful to be known; and the wickedness and vindictive Nature of Mankind, has made the knowledge thereof necessary. As its useful so its difficult, and is acknowledged to be so, by *Fortunatus Fidelis*, a learned Physician, who having written a Book in *Octavo, de Relationibus Medicorum*, in which (for clearing the cases wherein Judges are in use to call for the Advice of Physicians) he lib. 2. tit. 5. de *Mutilatione*, introduces his Discourse with these words: *Haec parva difficultas quibusdam medicis interdum offertur, sed quando a iudice demandatur est referendum; sed enim multis esse qui cum scientiarum titulo se vendunt, quid tamen ipsi sit mutilatio non ignorant.* And the Difficulty appears in the different Sentiments about it. The second Part is *Theologico-juridical*, and hath many thorny Questions in it, especially about the pain of *Resurrection*, which hath perplexed both Divines and Lawyers, and yet few have written on these two Delicts, as Delicts deserving punishment. It's true the Canonists have considered them as they are the Causes of Canonical irregularity; and many of the *Civilians* also have considered them as to that end; but they say little of them as they are punishable Crimes, which has induced me to

make this small Essay, hoping it may encourage others to do better; and if they discover any Mistakes, as perhaps they may, they'll do me a favour to correct them.

4

For understanding the different Expressions of the DD. it's necessary to premit, that the words *Mutilation* and *Demembration*, are variously taken by Divines and Lawyers, as also by Physicians (whom Lawyers use to consult in such Matters.) By *Mutilation* we commonly understand the Cessation and Privation of the Office, and distinct Operation of a Member, albeit no Particle of it be cut off: And by *Demembration*, we understand the cutting off of a Member, and in this sense we find these words used in the Journal Books. But *Fortunat. Fidel. dict. lib. 2. sect. 5. cap. 1.* makes use of the word *Debile*, to signify that which we call a *mutilated Member*, and of the words *mutilum, mutilatum, curtum, decurtatum, descissum vel detruncatum*; and of the Greek word *Colobon*, as Synonymous words, to signify a Member wanting an extreme part; and cites the words of *Aristotle 5. Metaph. cap. 27. Mutila sunt, non cujusve particule privatione, nam si carnem aut splenem tollas, non propterea mutilus remanebit, sed si extremitatem, atq; hanc non omnem, sed quæ, totâ ablata, generationem non habet.* By which it appears that the Nature of *Mutilation*, according to *Aristotle*, consists in a Want or Defect of the extreme parts of the Body which cannot be repaired. And so *Galen de diff. Morborum*, cited by him, defines *Mutilum* to be, *cui pars aliqua corporis est præcisa*; and affirms, that *Mutilation* may be of Eye, Ear, Nostrils, and of any fleshly part; as of the Tongue when the half of it is cut off. And again, *dict. sect. cap. 2.* he cites *Galen. 1. de diff. puls. 11.* describing *mutilatos ac decurtatos pulsus*, to be, *quibus de priore magnitudine aliquid deest.* And in that same place *Fortunat. Fidel.* says, *non quancumq; substantia jacturum mutilum constituere, nam si quis à proximo ortu, aut sine manu prodierit, aut aure, aut parte aliqua similiter fuerit destitutus, non mutilum illum sed mancum proprie nuncupabo.* And so he confounds *Mutilation* and *Demembration*, and also makes them to be Acts of Violence. In like manner, *Barbosa, de off. & potestat. Episc. alog. 42. N. 10.* by mutilated Members understands these, *quæ aliquo modo præcisa & obtruncata sunt.* And the Gloss and *Panormitan* in *C. de accus. in verb. Debilitatus* affirm *mutilum dicti, cui membrum aliquod abscissum; & mancum dici illum, cui membrum debile factum.* And this sense of the Words is approved by *Covarruv. dict. relic. 31. de Homicid. Num. 8. in fin. Calvin in Lexic. following Spigelius*, by the word *Mutilatus*, seems likewise to understand one who is demembred, because he explains the word *Mutilatus* by the words *corpore diminutus, Mutilati*, says he, *i. e. corpore diminuti.* And so the word is taken in *Gloss. ad §. 3. tit. 53. lib. 2. Feudor.* This is what *Mutilation* signifies according to the DD. above cited, and in the same sense is always taken by *Favin. fragm. crim. part 2. Argument. de irregularitate quam quis contrahit propter membri mutilationem. Num. 581. & seqq.*

5

I find the word *Mutilation* in King Roberts said Statute; and in my Opinion, it's there taken for *Demembration*; for it's there said, *If any man mutilats another, or wounds or hurts him be forethought felony, and the Party grieved pursue him before a Judge, such Form and Order of Process shall be led against him, as is ordained against a Man-slayer.* Now either the word *Mutilation* must signify *Demembration*, or it will follow, that *Demembration* is not in the Statute; and that *Mutilation* which is less than *Demembration*, is punishable as *Homicide*: For the following words of the Statute, ordain the *Mutilator* to be tryed by an Assize, and if he be convicted, his Life to be redeemable; which shews that his Life, for committing that Crime, is in the Kings Will. And therefore for correcting this Mistake, the Act 28. Parl. 3. Ju. 4. conjoyns *Slaughter* and *Demembration*, without mention of *Mutilation*. In our later Custom of Speaking, and in all the Journal Books extant,

from Robert to Edward the first, and from Edward the first to Edward the sixth, the word *Mu-*

Mutilation signifies only the taking away the use of a Member, the Member still remaining with the Body: and so is a less Crime than *Demembration*, which (according to the notation of the word) signifies Obtruncation, or a separating a Member from the Body; and some DD. do so understand and distinguish them.

It's further to be remarked, that *Mutilation* and *Demembration*, properly taken, are Names of Crimes, or if you please of Delicts, and so they are to be understood in these Laws and Acts of Parliament; and therefore it is, that in Act 6. Par. 16. Ja. 6. the Crime of *Mutilation* is expressed by that word in the Narrative of the Act; whereas the word *Amputation* is made use of in the Statutory Part, to express the Punishment of cutting off a Hand; and in like manner the words *abscindere* & *amputare*, are made use of to that end, in l. 3. & Auth. seq. c. de serv. fugit. & novel 134. cap. 18. And hence the DD. calls this punishment *pœna amputationis*. Carpz. prax. Criminal. p. 1. qu. 4. N. 43, 45, 48. This is the most ordinary way of expressing it; Yet I find mention of *pœna mutilationis membri*, in Cabal. resolut. crim. cent. 3. cas. 36. N. 25. I observe also, that *Paulus* in l. 10. ff. qui test. fac. pos. making mention of one who lost his Hand by accident, makes use of the words *qui manus amisit*, and says not *qui Dutilatus vel Demembratus*. And such a one is rather called *Mancus* than *Mutilatus*.

Mutilation then, as it's the name of a Delict, may be described to be, A 7 voluntary Act of privat Violence, by which one hurts a Member of anothers Body, to that degree, that the Member ceaseth to be useful. And this is commonly done by cutting the Nerves and Sinews by which the Member is moved. *Demembration*, is a further degree of this Violence, by which a Member is cut off and separated from the Body. And *Debilitation* is betwixt the two, and signifies with us, the weakening of a Member without taking away it's total use. I say with us, for Cabal. Cent. 3. resolut. cas. 236. N. 23. defines *Debilitation* to be *Impeditio principalis*, & *proprii officii ipsius membri*, which upon the Matter, is all one with *Mutilation*; and all others do the like, who confound the words *Mutilation* and *Demembration*, to signifie the same thing.

I call *Mutilation* and *Demembration* [Voluntary Acts,] to distinguish them 8 from the like deeds done in Defence. And hence we divide these Crimes as our Author does Homicide, into Voluntary, Necessary, Casual and Culpable; or more largely, as Carpz. p. 1. qu. 1. N. 13. to whom I refer: Or with Zoes. ad tit. ext. de Homicid. N. 2. we may reduce all to these four Heads, viz. Voluntary; and that is either unlawful: As when one intentionally designs to mutilate or dismember another without just cause; or Lawful, and that again is either Necessary and Defensive, when a Man does these Deeds in his own Defence. Or Punitive; such as is inflicted by Authority of the Magistrat. Or Casual, which falls out meerly by Chance: As if a Man defending himself, should accidentally hurt a By-stander. Or Culpable, which although it be not designed, yet it is not meerly by Chance.

We say [An Act of privat Violence] to distinguish it from Acts of punitive Justice. As when punishment of Amputation of a Hand is inflicted by Authority, which is also an Act of Violence, in that sense, in which a Man is said to dy a violent Death who dies by the hand of the publick Executioner. Such Punishments we read of, frequently in the Journal Books, to be inflicted upon notorious Robbers and Malefactors, as 6. Feb. 1618. in the case of James Douglass. and 25. March 1667. in the case of Patrick Roy Mackgregor (and his Accomplices) whose Sentence was to have their right Hands first cut off, and then to be hanged.

We say [Hurts a Member] and not [wounds it]. First, to shew that 10 *Mutilation* and *Demembration* may be committed without a Sword or such like Weapon. And therefore the Justices sustained *Mutilation* of a Leg, committed by breaking thereof in Wrestling. 6. June 1627. Leslie against

Harvie.

Harvel. and 11. March 1631. *Conferd* against *Scot*; in both which Decisions, this Allegiance (*viz.* that the Leg was not broken *aliquo* *modo*, But in wrestling, in which the Pursuer might have been the Breaker of his own Leg) was proposed and repell'd, in respect of the Libel, bearing that the Pannel broke the Pursuers Leg in the wrestling, by violently throwing him on the Ground. And very justly, for even Homicide is sustained by the Law of God, *Exod.* 21. 18, 19, 20. tho' it was committed by a Stone or a Stroke, with the Fist, or beating with a Rod. Of this manner of killing see at length *Carp.* p. 1. q. 3. N. 19 & seqq. where he sets down the several cases, and it were easie to adduce many Decisions to this purpose. Secondly, By the word (*Hurting*) we distinguish Mutilation from Demembration, which is committed by Amputation of the Member.

- 11 By the word (*Member*) we distinguish both Mutilation and Demembration from Homicide, which according to *Harprecht*: §. Item. 7. *inst. de pub. is violenta vite hominis ademptio*; or as *Farin. diff. q. 119. inspect. 1. N. 3. in fin.* it is, *animati corporis p remptio*. And if it happen (as often it doth) that the Wounding or Amputation of the Member, be the Cause of Death, then he who gave the the Hurt or Wound, is punishable as a Man-slayer; and not as a Mutilator or Demembrator. l. 15. ff. de Sicar. (there says *Ulpian*) *nihil interest, occidat quis, an causam mortis prebeat.*

- 12 The last Words of the Description of Mutilation [to that Degree, that the Member ceaseth to be useful i. e. cannot perform its wonted Operations *Carp.* diff. prax. crim. p. 2. q. 99. N. 25.] hold forth. 1. That Mutilation and Demembration are commonly committed on useful Members. 2. That every Wounding or Disabling of a Member, infers not the Crime and Pain of Mutilation, though there be much effusion of Blood. *Abbas in c. 1. qui clerici vel vocentes. N. 8. Navar: ibid. N. 223. Suarez. de censuris diff. 44. sect. 2. N. 6.* But the Member must cease to be useful; and yet wounding, per se makes a Delict, punishable by the Judge Ordinary, that's to say the Sheriff, to whom the Justices are in use frequently to remit it. 3. That tho' the Member may, by the Stroke it receives, lose its use for a time, yet if it recover its use, the Action of Mutilation ceaseth; and by the practice of the Justice Court, Year and Day is allowed to expect Recovery; within which time, Action for Mutilation cannot be sustained: as we shall shew when we come to the Defences.

- 13 And this brings us to a main point, which is, to know what is meant by a Member of the Body, to infer the Crimes and Pains of Mutilation and Demembration. This I say is a main point, because the first Defence that uses to be proposed against a Libel of Mutilation or Demembration; as for Example of a Finger, is, that *digitus non est membrum*, whereof see a large Debate *Num. 55. & seqq. infra.* And to prove this, the Pannel or Defender appeals to the Testimonies of Lawyers and Physicians; wherefore it is fit we should inquire into their Opinions concerning the Definition of a Member.

- 14 *Membrum*, or Member, (which comes from the word *meior metiris*, to Divide. *Cabal. resolut. cont. 3. cas. 236. N. 2.*) is variously distinguished. First, Some are called Principal Members, which operat by themselves; such as the Tongue, in Speaking; and others, *suaservient*, as the Teeth and Lips, which assist the Tongue in forming of Words.

- 15 Again, Some are called Members in a proper and strict Sense; others, in a large and abusive Sense. The last of these includes all the organical and similar Parts; That is to say, the Flesh, Nerves and Veins; which are of the same Contexture throughout the whole Body, and in this improper Sense, a Member is defined to be, *A solid continued part of the Body, begotten of Commixtion of Humours, thickned and formed by the Strength of Nature.* *Arist. lib. 1. de hist. Animal. cap. 1. Galen. lib. 1. de usu partium. cap. 1. Fortunat. Fidel. de rebus. medic. lib. 2. sect. 6. cap. 1. & 2. Zacchias quest. medico-legal. lib. 5. tit.*

3. qu. 1. N. 5. 6. & 7. where he cites *Avicenna* the Author of the Definition. But in the *strict* and proper Sense, a Member is defined to be a *Particle*, or part of the Body, not circumscribed on all sides, nor joyned every way to the Body, nor to another Member of the Body. And this agrees to all the extreame parts of the Body, and makes them to be proper Members. And so *Fortunat. Fidel.* defines it, *dist. cap. 1.* And he takes it from *Aristotle* and *Galen.* and *Covarruv.* follows it, *Init. relect. 1. de homicid. N. 8.* But they both and *Zacch. dist. loc.* give this as the more common and received Definition, viz. That it is a part of the Body, performing a proper and perfect Action and Operation, which no other Member can perform, and which ceaseth to be performed, if that Member cease to be. And this Definition is embraced by *Suarez. de censuris. disp. 44: sect. 2: N: 6.* who in equivalent words defines it to be, that part of the Body *Qua est quasi integrum instrumentum proximum alicujus actionis*; and sayes, that this the *Summists* hold for a Rule, herein following *Panormitan, Bartolus, Baldus* and others, who, sayes he, put this Sense upon it in their Disputations anent the sense of this Statute punishing *Mutilation*. And the same is embraced by *Cabal: Num: 4. & seq:* where he compares the Body of Man to the Structure of a House: and the proper Members, of the Body to the Hall, Chambers and Kitchen, which have distinct uses in the House; and the improper Members to the Stones of the House, which are of the same Contexture throughout all the House, but have no distinct use in it. And for this he cites *Bartolus* and *Baldus*, and many others upon divers Texts; but chiefly in l: 2. ff: de publ. judic. & l: si fugitivi. c. de servis fugit. *Caballus dist. cas: N: 115.* makes another Division of Members, viz: in *instrumentalia & formalia*, & ex his alia majora alia minora. de quibus late tradunt DD: in l. 2. : ff: de publ. jud. *Baldus* in l: 3: l: de accusat: & in l. data opera C. iis qui accus. pos. and others cited by him.

And again the said *Fortunat. Fidel: dist. cap. 2. imprim.* describes the Action¹⁶ of the Member; for Example of the Hand, to be it's motion towards the object; and it's Use to be the apprehending of the Object. So that now it's easie to resolve what it is to mutilate a proper Member. viz. nothing else but to make it uncapable of moving to, and apprehending of the Object.

But then some object and say, that if it be necessary to the Essence of *Muti-*¹⁷
lation, that the Member be so totally disabled, that it's for no more use to the Body; it's all one upon the matter to Mutilate and Demember, and so *Mutilation* and *Demembration*, which we define as distinct Crimes, are confounded. This Objection is moved by *Suarez. dist. disp. 44: § 2. N: 5.* where he distinguishes and defines these two Crimes, as we do, from the Authority of *Panormitan* in *Clement. Unic. de homicid.* and yet answers to the Objection; that suppose the Fault were equal, yet the Effect is not simply the same, which is sufficient for not extending the punishment. Next, he says, the Damage in both is not equal, because the Deformity is not equal. Moreover a withered Hand has still the name of a Hand, and of a Member so long as it's affixed to the Body; as we shall shew when we come to speak of the Hand in particular.

The next thing, that falls in my way, is to speak of each particular part of¹⁸ the Body separately, and to shew which of them falls under the Definition of a proper Member, and which not: And because we have much Light from the Canonists in this Point (who describe the Nature of Members; and of *Mutilation* and *Demembration* committed upon them, in order to clear the Nature of Canonical Regularity and Irregularity) I crave leave to digress a little upon this Subject, and to shew how it's concerned with the Crimes of *Mutilation* and *Demembration*.

- 19 To be irregular then, in a canonical Sense, is to be entered in one of the Religious Orders of the *Roman Church*, and to be subject to the Rules of the Order, whence is the Denomination of *Regular*; and Irregularity is to be under a Canonical Impediment, that hinders to enter into the Order, or to remain in it, if entered. *Covarruv. init. relect. de Homicid. N. 1.* And the Denomination of Canonical comes from the Word *Canon*, (which also signifies regular) because the first Institution of this regularity in the Christian Church, is from the Canons of the Church. *Covarruv. N. 2. ibid.*
- 20 Among the Causes of Irregularity, introduced by these Canons, to exclude a Man from holy Orders; this is one; that a man is vitiated or defective in his Body. This was first established among the *Jews*, *Levit. 21.* It came from them to the Heathen Nations, among whom we find it. *Plin: lib. 7: nat: hist. cap: 28. Seneca lib. 4. declam. 2.* particularly, it was among the *Romans*, *Dionys: lib. 2: Romanarum antiquitatum.* And among the *Perfians*, *Alex. ab Alex. lib. 6. dierum genial. cap: 14.* and came last into the *Roman Church* by the Canons of *Gelasius* and *Honorius* Bishops of *Rome.* *Dist: 53. c. 1. & 2.* The words of the last are, *Pœnitentes vel inscii literarum, aut aliqua membrorum damna perpeffi, ad sacros ordines aspirare non audeant.* which has it's Declarations and Restrictions in the other C C. of that *Distinction*; and in the *Titles of the Decretals*; *de regularibus & transseunt. ad Relig. & de Corp: vitiat. ordinand: vel non.* All explained by *Parnormitan.* *Covarruv. dict. relect: de homicid. Zoes. de homicid: Farin. fragm. part 2. N. 401. & seqq. Suarez: dict: disp: 44: sect. 2.*
- 21 This Defect of the Body as it was sometimes by Nature, and by accident; so oftentimes it fell out by the Crimes of *Mutilation* and *Demembration*: And the *Committer* became irregular, by doing the fact; *Clem. unic. de homicid.* except in the Cases there excepted; As also the *Patient*, if either it did render him incapable to discharge his duty; or left a *Cicatrice* in his Face, or other visible Deformity. *Covarruv. dict. relect: part: 3. N. 8.* whereby many persons, sufficiently qualified to bear Office in the Church, were made incapable of bearing it: which occasioned some of the *Canonists*, and *Civilians* following them, to contract the Number of proper Members of the Body, into a lesser compass than probably they would have done, if it had not been to restrict the Number of the Cases of Irregularitie.
- 22 From this Digression, I draw this useful Rule to our purpose. *That in all the cases wherein the Canonists conclude the Committer of Mutilation and Demembration to become thereby Irregular, we may conclude him by the same facts, to be liable to the punishments enjoined by our Laws for the same Crimes: tho' we cannot on the other part agree with them in all the cases wherein they think Mutilation is not committed; because where there is any doubt concerning the Nature of a Member, if it be properly a Member or not, in order to punishment, much is left to the Arbitriment of the Criminal Judge. as Paulus Zacch: does frequently acknowledge, dict: tit: 3. qu. 3: N: 7: in fin. & qu: 4: N: 27: & 31. and qu. 5: N. 28. in fin.* So that the Judge may go further in finding *Mutilation* and *Demembration*, than the *Canonists* do.
- 23 And now I come to inquire into the Nature of each Member in particular; And in the first place, it's granted by all Lawyers and Physicians, that the Eye is a Member of the Body in the most proper and strict sense: Because it performs the Action of *Seeing*, which no other Member of the Body can perform, and which Action ceases to be performed, when the Eye ceases to be.

Demembration may be committed on the Eye two Ways. First, *Forma-24*
liter, by pulling out the Eyes; and this is so atrocious a Crime, that it deserves the severest punishment, both for the Design, and because this Member is most useful in foreseeing the Dangers of the Body, and directing it in all its other Actions and Operations; as also because, by it's being put out, the Body is deprived of all it's lawful pleasures, and especially of the Benefit of Reading, which instructs the Soul. The punishment of this Crime, demonstrates the greatness of it *Leo Novel. suag2* commands the Eye of him who pulls out one Eye to be likewise pulled out; and if he have pulled out both Eyes, to lose but one, not that he thereby intended to favour the *Delinquent*, but the Party injured; for, as he there saith, the Man who was made blind, had no advantage by the *Delinquents* being made blind, therefore he restricted the punishment to one Eye, and instead of the other, he commanded that the *Delinquent* should alimment the Man whom he had made blind. To this *Quintilian* doth agree, *declamat 297. qui excæcerit aliquem aut talionem præbeat, aut excacati dux sit.* This was in case the *Delinquent* was Rich, but if he were Poor, he was to lose both his Eyes. But *Joannes Dubravius*, Bishop of *Ulm. lib. 12. hist. Bohem.* cited by *Camerarius. medit. hist. cap. 99.* Reports, that the Emperor *Charles the fourth*, sitting in Judgement, caused a Sentence to be pronounced against *Zachora* a Nobleman of the Empire, to lose both his Eyes, for pulling out both the Eyes of a Priest without any Provocation, save only that he did reprove him for Errors, not considering that he was his Patron. The Crime indeed was atrocious, and therefore the Defences proponed by *Zachora, viz.* That he did it in passion, was penitent, and had ingeniously confessed the Crime, and was willing to pay any Ransome the Judges should decern; were all repelled and no regard had thereto.

Secondly, *Demembration* may be committed by so wounding the Eye, that²⁵ the Substance of it withers and decays. *Farin. fragm. p. 2. N. 596.* This he calls *mutilari substantialiter, vel demembrari, & corpus oculo privari.* And this seems to have been the case of the Pursuit before the Justices, 18. June 1642. at the instance of *Andrew Alexander* and his Father against *David Young*, eldest Son to *Young of Kirkton*, for putting out his left Eye with a hard Clay Bullet from a Pluff, & thereby demembring him of that Eye which was his only Eye, the other being lost by the small Pox. No Decision followed on it, because the Parents transacted for their Children, in respect they were but young Boys at the School, and the Crime was considered as done, *ex lascivia & non ex dolo.*

The Eye is mutilated either by a total Abolition of the Action of Seeing,²⁶ which is when no sight remaineth; or by a Diminution of the Sight to that Degree, that there remains no sufficiency to direct a man to walk in the way without help, and which among other Causes may be occasioned by a Wound in the Forehead above the Eye-brows transverswise, which makes the Flesh to press down-ward upon the Eye, and to obstruct it's opening. *vid. Fortunat. Fidel. lib. 2. de relat. medic. cap. 4.* And also it may be occasioned by a Stroke on the Head, which makes a Defluxion to fall on the Eye, producing (as it often times comes to pass) a *Cataract* on the Eye, or a thin Skin, which we commonly call a *Slough* or *Striffen*, or *Film*: And therefore the Justices 8. July. 1643. found a Libel at *Logies* instance against *Howison* Portioner of *Cramond*, bearing, that the Pannel had mutilated his Eyes to that Degree, by such a Stroke on the Head, relevant to infer the Crime and punishment of *Mutilation.*

But a Depravation of the Action of Seeing, (which is when the Object appears double, or otherwise than it should) does not infer *Mutilation*: tho²⁷

it be a Delict, or Crime punishable in suo genere. *Cabalus dicto casu* 236. N. 123. calls it Deturpation, & says that *debilitatio membri* [meaning Mutilation] being nothing else but *impeditio principalis & proprii officii ipsius membri* it follows, that *oculus non dicitur debilitatus, si quis videt ut prius, licet propter itum, oculus sit deturpatus aequaliter.*

28 Secondly, The Tongue is acknowledged by all to be a Member in the proper Sense, because it performs the distinct operation of Speaking, and besides it contributes to Deglutition and Mastication. *Bartolus, & alii D. D. in l. ff. de pub. j. d. col. ult. N. 13. & l. Si cui lingua ff. de Edil. edict. Cabal. dict. cas. 236. N. 9.* where he mocks *Capola*, for denying it to be a Member, on no better reason, but that it performed all these Actions.

29 Demembration is committed, if the Tongue be cut out by the Root; which may be done without danger of Life. And there can be no more speaking, unless it be by a Miracle, like that which the Emperour *Justinian in l. 1. in prin. c. de off. praefect. prator. Afric.* testifies of the venerable Confessors whom he saw in *Africk*. *Qui abscissis radicibus linguis, penas suas miserabiliter loquebantur*, related their case after their Tongues were cut out by the Roots at the command of *Honoricus King of the Vandals.*

30 Mutilation is committed on the Tongue, by cutting a part of it, whereby it is rendered incapable to speak, at least to be understood. And yet a person with a mutilated Tongue, or who has any impediment in his speech, may be *sanus* as to exclude an Action of Redhibition. *per l. 10. §. ult. ff. de Edil. edict.* where *Ulpian* says that *Balbus, Blasus, Atypus* isq; *qui tardius loquitur, varus & varius, sani sunt*; But if it be true that the Tongue being a fleshy part, will grow again, and speak as well as formerly (which *Zacch. in dict. tit. 3. qu. 5. N. 28.* testifies to be from Art and Experience) then Mutilation is not committed by cutting off the tip of the Tongue, at least some time must be allowed to expect Recovery.

31 Thirdly the *D. D.* deny the Lipps to be Members of the Body in a proper sense, because they perform not a distinct Operation; but only concur as instruments with the Tongue in forming of Words. *Arist 2. de part. animal. 16. Zacch. dict. tit. 3. qu. 4. N. 30. Fortunat. Fidel. §. 6. cap. 2.* and among the Lawyers *Covarruv. dict. init. relect. de Homicid. part. 1. N. 8. Farin. Fragm. part. 2. N. 587.* And therefore according to them Mutilation or Demembration cannot be inferred from hurting or preclinding the Lipps; but they grant they are Injuries in suo genere, because they take away an usefull part of the Body for helping of Speech, and that the want thereof creates a seen Deformity, by exposing the inward part of the Mouth to publick view, and so by the Canon Law makes the Patient, canonically irregular, tho' not the Agent; because he did not preclind a Member *Covarruv. Relect. de Homicid. quest. 3 init. N. 8.* This is one of the Cases remitted to the Arbitriment of the Judge *Zacch. dict. tit. 3. qu. 4. N. 31.*

32 Fourthly the *D. D.* conclude the Teeth to be no Members of the Body in a proper sense, *Farin. fragm. part. 2. N. 585.* because, says he, they make not up the Integral or Consistence of the intire Body, but do only belong to the Beauty and Ornament of it; As also that they performe no proper Action, but only assist the Tongue, as the Lipps do, in forming of Words, so *Cabal. Cas. 236. N. 12. & seqq.* and the *D. D.* cited by him *Covarruv. init. Relect. part. 3. de Homicid. N. 8.* Further they adduce the words of *Paulus in l. 7. ff. de Edil. edict. Cui Deus abesse non est morbosus, magna enim pars hominum aliquo dente caret, neque ideo morbofi sunt, praesertim cum sine dentibus nascimur, nec ideo minus sani sumus donec dentes habeamus, alioquin nullus senex sanus esset.* And to these Lawyers, the Physicians agree, viz, *Fortunat. fidel. dict. lib.*

Of Mutilation and Demembration

13

2. *de relat.* §. 6. cap. 2. *Zacch. dict.* tit. 3. qu. 5: N: 19. Who says, that the want of Teeth may be made up by Art, if they be not all excused; meaning that the Artificial Teeth may be tyed to those that remain, and they conclude that since Mutilation and Demembration can only be committed upon proper Members, they cannot be committed by excusing of the Teeth.

But notwithstanding, there is much to be said for the affirmative. For, 1. *Zacchias* seems to grant, that if no natural Teeth remain but all be excused, then there is a clear Demembration. 2. As the Teeth concur with the Tongue in forming of Words, so they performe a special Action in grinding or chewing the Meat for the Stomach, whence they are called Grinders: And the decay of them reckoned among the Forerunners of Death, *Ecclesiast.* 12. 3. 3. They are ranked by *Moses* with the Eye, Hand and Foot in the Law of Retaliation, *Exod.* 21. 24. and its yielded by all that Eye, Hand and Foot, are Members in the proper sense. 4. They concur in Mastication.

And to the Arguments for the Negative, I answer; first, That the Gloss on the said Words of *Paulus* l. 11. ff. *de Edil. edit.* acknowledges the Reason of the Law to be bad; and if it were good, it would likewise prove, that a hand is no proper Member; because some are born without a hand, and may live and be served without it. 2. It is of no import that the want of a few Teeth may be supplied by Art, for so may the want of a Hand or Foot; and a man can go upon stumps, where both Legs are wanting.

Fifthly, the Nose is a Member in the proper sense; for this we have; first the Authority of Naturalists and Physicians as *Arist.* lib. 1: *de part. animal.* *Hippocrat:* lib. 1. *de dieta.* *Vales.* *controv.* lib. 2. *contr:* 26: And among the Lawyers, *Farin.* in *append. de immunit:* *Eccles.* Cap: 6: N: 249: & in *Fragm:* p: 2: N. 587. where he defines a proper Member by its quality of exercising a distinct Operation: and for examples condescends on Hands for grasping; Feet for walking; Eyes for seeing; Ears for hearing; and Nose for smelling: So that according to him, the Nose is as properly a Member as any of the others named; and hence he concludes, that he who Mutilates or Demembers the Nose, or any of these other Members, becomes thereby irregular, (which could not be by preclinding or Mutilating an improper Member, for this he denies, N. 585. *ibid.*) and consequently by so doing he incurs the Crime and Pains of Mutilation or Demembration: For to be guilty of the Crime in order to punishment and to become irregular, are equipollent in the Canon Law as we said before *Num.* 22. And for the same cause, *Zacch:* *dict:* qu: 4. N. 3. & 5. concludes in the general; *Naso mutilato, ea omnia locum habent, quæ in cæteris mutilatis membris habere diximus.* And again, *in eum qui nares abscidit, non modo pari ratione, ut in eum, qui aliud quodcunque membrum abscidit, sed majori severitate animadvertitur non ob id tantum, quod hæc pars unica in nostro corpore sit, & nequaquam duplicata, ut Oculus, Manus, Pes, Auris, Labium, sed quia realiter majus multo dedecus affert abscissio Nasi, quàm alterius cujuscunque partis, etiam ipsius manus.* And cites *Paris a put: dore milit:* lib: 8: cap: Quando unus eff: ocul. alter & alter abscid: nas. *Videitur ergo quacunque leges de membris, de eorumq; mutilatione sanciverunt, rectè ad nasum etiam sunt transferenda.* These are the words of *Zacchias*, which are only applicable to corporal and not to canonical Punishments.

That the Nose is a Member in the proper sense, is also evident, because it only, and no other Member, exercees the Function of smelling: For this, we have common Experience; every one offering an Odoriferous thing to the Nose.

Its objected, that the Argument drawn from smelling doth not conclude; because many men who have expanded Nostrils want the sense of smelling;

ex: gr: when a Defluction of Salt and thickened Humors falls upon the Lungs, Mouth and Nosestrils from the Ventricles of the Braine, by the Nerves of Smelling; This distemper (which the Physicians call *Coryza*) will obstruct the sense of Smelling, (even when the Nosestrils remain patent) as sometimes a worse Disease doth, where it occasions *os cribrosum*. To which it is answered, that accidental Distempers do not change the nature of Members, for a Hand or Foot, may lose their proper use by a palse or other accident and yet we cannot from hence infer that they are not proper Members.

38 But suppose that it were granted that the Nose is not the proper Instrument of smelling, yet it is still a Member in the proper sense, because these who deny it to be the proper Instrument of smelling, (viz. *Fortunat. fidel: lib. 2. de relat. medic. §. 2: cap. 1.* And *Paris a puteo; ubi supra*, N. 2. And *Galen. in lib: de instrum. odor.*) Yet do grant that it hath divers other distinct Operations; As that it's the *Tubulus* or conduit, by which the *Mucus* descends from the Brain; And is the chief Instrument of *Respiration*; As also of *Sounds*: So that where the Nose is wanting, the sound of Words is not distinct: By which Concession, the Nose must yet be a proper Member, according to those who deny it to be the proper Instrument of Smelling; because it exercises the other three Functions. As *Taliacotius* proves *chirurg. nov. lib. 1. cap. 6.*

39 Sixthly, there is greater difficulty to determine whether the Ear be a proper member or not; to clear the Question, know that the Ear is defined by *Arist. l. 1. de hist. animal.* to be that part of the Head which is fabricated for hearing. We must distinguish here betwixt the internal Ear called *Auris*, and the External called *Auricula*, which is the Cartilaginous Substance guarding and defending the *Auris* from Danger, and with us is commonly called the LUGG, yet tho' the Words *Auris* and *Auricula* be so distinguish'd, they are promiscuously used in speaking, and nothing is more frequent among the D D. than *abscindere Aurem; & quod, Auris sit ornamentum corporis. Zacch: quæst medico-leg. lib. 10. Consil: 35: N. 2.* That the *Auris* is a proper member, is acknowledged by all, because it is the sole Instrument of Hearing, and therefore if any deed be done to prejudice the *Auris*, so as to deprive it of the Faculty of Hearing, it infers the Crime of Mutilation; nevertheless it is contraverted whether the *Auricula* or external Ear be a proper Member.

40 These among the Physicians who deny the *Auricula* to be a proper Member, are *Fortunat: fidel: §. 6. cap. 2. Zacch: quæst: medico-legal qu: 4. N. 26. & seqq. & consilio 35.* where he says that being consulted in the case of a Clergie man who had lost the upper part of his *Auricula* or external Ear, by a Wound in *Rixâ*; whether he thereby became irregular and incapable of Promotion, as one who wanted a Part of a proper Member? He resolved (N. 13.) that the *Auricula* was no proper Member, nor reckoned among proper Members by any man, and that therefore the Canonists with much justice had declared, that the Abscission of the Ear infer'd not irregularitie. With those, several Lawyers do agree, as *Covar. init: part: 3. Relect. de homici. N. 8. vers. incip. primum.* where he expressly affirms, that when the *Auricula* is cut off, a Member is not cut off; because, the *Auris* is properly the Member, and the *Auricula* or Cartilaginous Substance, is rather for Ornament and Safeguard to the *Auris*, than for use to the Body; and for this he cites *Baldus in l. serv. fugit. ad fin. Farinacius* is of the same Opinion, in *dict. fragm. part. 2. N. 590.* where he cites *Covar. Navar.* and divers others; distinguishing betwixt *Auris* and *Auricula*, and these Doctors urge for themselves the words of *Ulpian in l. idem offilius 10. ff. de Edil. edit.*

41 But for the affirmative there are others of no less Authority; First, among the Physicians, *Galen in lib. de instrum. odoris*, and among the Lawyers the *Gloss in c. singula. verb. Oculus 89. distinct.* And *Majol. cited by Farin. in fragm.*

part. 2. N. 591. affirming that if the Law of irregularity had been in S. Peters time (as it is a humane Constitution of a latter date) he had been declared irregular (and consequently a *Demembrator*) for cutting off of *Malébus* his Ear, unless he had been excused for defending his Master. In the same opinion is *Speculator in tit. de dispensat §. juxta. Num. 8.* Likewise *Suarez. de Censuris disput. 44. sect. 2. N. 9.* asserts that the *Auricula* or outward Ear is a Member in the proper Sense, and rejects the Opinion of *Covarruv.* upon this Reason, that the *Auricula* Co-operats with, and contributes much to the Organ of Hearing, and from thence concludes, that the Amputation thereof infers Irregularity, and that not upon the account of Deformity, occasioned by the want of the *Auricula*, (that being obscured by the Hair) but because of *Demembration*, in respect that Deformity without *Demembration* (which he expresses by the Word *Mutilation*) makes not irregularity.

As *Suarez.* believes the Crime of *Demembration* to be committed by Amputation of the *Auricula*, in regard of its contributing to the Organ of Hearing; so P. *Zacch. in dict. qu. 4. N. 24. 27. 28.* though he denies the Ear to be a proper Member, yet he confesses it contributes much to the Organ of Hearing, and that a sound, without it, is like the Noise of the running of Water, and therefore allows the Lawyers to count the *Auricula* among the proper members in order to infer the Crimes and Pains of Amputation. *in quo casu (inquit) bene dicitur aurem esse membrum, quia abscindens aurem eisdem penis subicitur, quibus subicitur abscindens membrum. Unde etiam in Auris abscissione habet locum id, quod in abscissione membri quoddam immunitatem ecclesiasticam, quâ abscindentes membra in ecclesia non gaudent, and concludes his Discourse N. 31. by remitting all to be determined by the Lawyers.* Now, all this must be understood of the outward Ear or *Auricula*, because the *Auris* or inward Ear cannot be abscinded.

But then a Question remains to be answered, whether or not the Amputation of a part of the *Auricula* be sufficient to infer the Crime of *Demembration*? and the same may be urged as to the Amputation of a part of any other Member. *Suarez. dict. disput. 44. Sect. 2. N. 8. in med.* says, that its sufficient for *Mutilation* [meaning *Demembration*] that there be either *integra abscissio, vel gravis diminutio alicujus principalis membri*, and he there speaks of the *Auricula* (for there could be no *Abcission* of the *Auris*, either in whole or in part). *Zacch. dict. consil. 35. N. 8. & 9.* maintains the contrary, and especially as to the Ear, where he says that the *abcission* of a part, and chiefly of the Superior part, which the Physicians call *Dinna* or *Helix*, infers not *Demembration* because it wrongs not the sense of Hearing. We have a Decision 22. *June 1610. Guibrie* against *Rynd* where the Justices refused to sustain *Demembration* inferred from cutting off a part of the LUGG or Ear, and remitted the Cause to be tried, as a common Ryot before the Sheriff of the Shire as the Judge Ordinarie.

Seventhly, The *Chin* is by all acknowledged to be no Member in the proper sense, because it performs no distinct Operation, and is only useful for decorating and adorning the Body. *Farin. dict. fragm. crim. part. 2. N. 565.* where he cites *Majol.* and (following the Canon Law) concludes that the Amputation of the *Chin* infers not irregularity against the Committer, and consequently no Crime of *Demembration* according to them: But every one grants, that to cut off the *Chin* is a Ryot, or *Delict*, severely punishable; because it creates a Deformity in the Face, and makes the Patient (though not the Agent) irregular.

- 45 Eighthly, The *Beard* is no *Member*; Nevertheless to cut off, or to pluck out the Hairs of ones *Beard* without his Consent, even albeit no Blood follow is an Injury, according to *Oinol.* cited by *Zacchias Quest. medico-leg. lib. 3. tit. 3. q. 5. N. 14.* And there is good Reason why it should be punished; because the *Ancients* expressed their sadness by permitting the *Beard* to grow. *Item quod labionem* 15. §. *generaliter* 27. *ver. Hac autem fere ff. de injuriis.* Divers Authors are cited by *Cujacius, lib. 6. observ. 5.* to prove this Custom and therefore *l. 39. dict. tit.* it was not permitted to any man *vestem sordidam Rei nomine, in publico habere, capillumve summittere, nisi ita conjunctus erat asinitate, ut inivitus, in Reum testimonium dicere cogi non possit.* Further, to cut ones *Beard* was a mark of indignity; and therefore *David* resented it, when it was done to his Ambassadors by *Hannun, King of the Ammonites* 2 Sam. 10. 4. 5. where it is said that *David's* Messengers were ashamed. But albeit the *Beard* be no *Member*, yet, this cutting it off, is punishable *pœna incidendi membrum,* according to *Baldus, in l. Reos. C. de accusat. N. 6. & from this Baldus concludes the Beard to be a Member in the proper Sense,* but others in the general Sense only as the extremities of the Nails of the Fingers are Members which we daily cut off. *Guazzin. de defensione Reorum. def. 33. Cap. 6. N. 5.*
- 46 Ninthly, The *Paps*, or *Dugs* of a Woman, are *Members* in the proper sense; for their producing Milk and giving Suck is a distinct Operation; And therefore he who preclinds them becomes by the *Canon Law*, irregular, and consequently a *Demembrator*, according to our former Rule. N. 22. of arguing from irregularity to *Demembration* against the *Committer* of the Crime. of this Opinion are *Farin. dict. fragm. crim. part. 2. N. 593. Baldus, in l. data opera. N. 75. C. qui accus: non poss. Suarez. disp. 44. sect. 2. num. 9. fin. verj. solet dubitari,* with divers others cited by *Farinacius.*
- 47 Tenthly, It may be controverted, if the *Spondyls* be proper *Members*, or not. They are called in Greek *Σπονδυλοι* in Latine *Vertebra*; because by their help, the Body turns. They are in Number 29. whereof 7. in the Neck; 12 in the Back; 5. in the Loins; and 5. in the *os sacro*; as the *Anatomists* reckon. *Vid. Castelli. l. xix. ad Verbum, Spondylus.* The Reason of the Doubt is, that none of the above-mentioned Authors have counted them among the proper *Members*: And yet on the other part they performe a distinct Operation, because by them, several places of the Body are turned. By our practise they have been found to be proper *Members*; for the Justices 7 Nov. 1621. found a *Lybel of Mutilation*, alledged to be committed by *Marion Paton* upon *Williamson* her Apprentice, by dislocating the *Spondyls* of his Back, relevant to infer the Crime and pain of *Mutilation*, and remitted the *Lybel* to the knowledge of an Inquest; but no Decision followed, because she proved that the Pursuer recovered. Now if from hence you will not allow the *Spondyls* to answer to the precise and exact Definition of *Members* in a proper sense, then you must grant, that the Justices sometimes make use of the Power which they have, according to the Concessions of *Zacchias dict. quest. medico-legal. dict. lib. 5. qu. 4. N. 27. and 31.* where he says, that Lawyers are not tyed to the precise Definition which Physicians give of a *Member.*
- 48 Eleventhly, *Castratio virilium* is one of the most atrocious *Demembrations*; and when a man does it to himself, he is *sui homicida.* C. 4: *dist. 55.* And so punishable with Death and Confiscation of Goods, *l. 4. §. 2 ad leg: Cornel: de sicar:* And its equivalent if one suffered himself willingly to be castrated by another; *dict. §. Farin. fragm. crim. part. 2. N. 584. and the D D. cited by him. Hac castratio fit, vel præcisione virilium, vel faciendo Spadones, thlibias, thlasios;* *dict. §. 2.* As to all the Species and Punishments of this Crime, *vid. novel. 142. de his qui Eunuchos faciunt. & novel. leonis 60.* See also *Covar: init. prim. par. relect. de homicid. N. 6.* where he adduces many Texts and Reasons to prove that

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that it was unlawfull for any man *seipsum castrare prætectu Religionis, vel volenter id pati ab aliis sibi fieri.* And therefore *Eusebius* is justly reprobable for defending *Origin* upon that account. The common Reason is; that *nemo membrorum suorum est Dominus. l. 13. ad legem Aquiliam.* whether this Crime may be punished *pœna talionis* will occur to be spoke of afterwards, upon the Question, how far the Law of Retaliation is yet in Force.

Twelvthly, I come now to speak of the *Hand*, which in a large Sense is taken for the whole *Arme*, but more particularly for that *qui cubito annexitur*; 49 and 1. includes, the *Carpus* or *Wrest*, or first part of the *Palm* of the *Hand*; or that part of the *Arme*, which is betwixt the lowermost part of the *Cubit* and the *Hand*, and consists of eight small *Bones*, with which the *Cubit* is joyned to the *Hand*: 2. It includes the *Metacarpus* or *Metacarpium*, or back of the *Hand*, made of four oblong little *Bones*, which expand the *Palm* of the *Hand*, called *postbrachialia*. 3. it includes the *Digiti* or *Fingers* joyned to the *Metacarpus*; the outmost Bounds whereof are called *Metachondyli*. It is called a *Member*. *Novel. 134. cap. 13.*

We need not insist to prove that the *Hand* thus composed is a *Member* in the proper sense, and that it has a distinct Operation, this is not only confessed 50 by all, but to the end that *Amputation* of the *Hand* may be the more abhor'd and severely punished, the *Doctors* of *Law* and *Medicine* have condescended on it's several Uses. viz. By the *Hand* one defends himself from the Cruelty of *Man* and *Beast*; by it he rules and commands *Beasts* to be subject to him, even such as are of the wildest Nature; it serves to many uses for his *Body*; and is useful to the very *Beasts* that serve him; and being stretched forward it supplies the want of the *Eyes*, by preventing of several Dangers; and by signs, it many times supplies the want of the *Tongue*. These are collected out of *Cæli. Rodig. lib. 4. lect. antiq. Cap. 3. Galen. lib. 1. de usu partium cap. 3. & lib. 11. Arist. 4. de part. anim. Cap. 10. Cicer. lib. 2. de nat. Deor. Fortunat. Fidel. lib. 2. relat. med. §. 4. Cap. 1.* Therefore the *Justices* have always found *Demembration* to be incurred by the cutting off of the *Hand*, and *Mutilation* by the hurting thereof to that Degree that it became useless. 5. May 1605. *Skirven* against *Forrester*, for mutilating him of the *Hand*. 26. Nov. 1613. *John Hunter Taylor* against *Menzies* of *Castlehill*, who came in the *Kings Will*, and was fyn'd in 100. lib. Scots. and 30. July 1614. *Donaldson* against *Lorimer*. And 10. July 1635. *Thomson* and her Spouse against *Gillespie, Thomson* and others. The like 24. July 1635. *Fletcher* of *Benshaw* against *Ramsay, Lindsay* and *Lord Spyney*, for Mutilating him of the *Left-hand*. I should not need to cite Decisions in so clear a Matter, were it not the Custom.

Thirteenthly, There is as little Doubt, that the *Leg* is a proper Member, and that it has its distinct use profitable to the *Body*, and which can be best judged by such as want it. We have the following Decisions. viz. 6. June 1627. *Lestly* against *Harvie* for Mutilating his left *Leg*. 20. July 1627. *Patterson* against *Wordie* for Mutilating his right *Leg*. And in the foresaid case, 3. Novem. 1621. *Williamson* against *Paton* for shortning one of his *Legs* by wounding thereof. and the like was pursued 28. July 1647. *Forbes* of *Lestly* against the *Laird* of *Pitfodells* for mutilating one of his *Legs* by the Shot of a *Pistol*; in which *pœna talionis* was lybelled, but it came to no Decision: As also 11. March 1631. above-cited, *Crawford* against *Scot*; where the *Justices* sustained *Mutilation* for *Scots* breaking of *Crawfurds Leg* in *Wrestling*, and remitted it to the knowledge of an *Affise*, whereby he was convicted and fined in 250. Merks. The like 19. March 1690. *Relist* and Children of *Fenton* against *Montgomery* for breaking of *Fentons Leg*; where the *Lords Commissioners* of *Justiciary* found the *Lybel*, as founded upon *Presumptions*, relevant

to infer an Arbitrary punishment, and fyned him in 2500. *Merks*. This case is as plain as that of the Hand, and therefore Decisions are only cited for Custome.

- 52 Fourteenthly, The greatest Difficulty is about the Fingers and Toes, whether they are Members *per se*, or only parts of the Hands and Feet. The D D. are divided in their Opinions; most of them are for the Negative, but some are for the Affirmative. Others distinguish betwixt the cutting off or Mutilating the whole, and a part only.
- 53 For the Negative simply, *viz.* That the *Fingers* are no Members, we have these Lawyers *Bartolus ad l. 14. ff. de statu. & in l. 2. de pub. jud. N. 13.* Where he says expressly *digitus non est membrum, sed pars Membri*, and if there were a Statute ordaining Amputation of a Member to be punished *lege talionis*, it would not be extended to the Amputation of a Finger. And *Baldus in dict. leg.* says, *digitus non est membrum sed pars officialis membri*, and that, *aliud est dividere rem in membra, & aliud in frusta, & sic amputans digitum non dicitur amputare membrum*; and again, *Digitus est tantum membrum in diminutivo, non membrum proprie & principaliter, quia non est aliquota pars corporis sed aliquanta particula respectu qualitatis*, and compares it to a Tree of the Roof and a stone in the Wall of a House, which are but parts of the Roof and Wall, and not Members of the House. And with these agree *Decius in l. si fugitivi C. de servis fugit N. 26. Julius Clarus. Farin. frag. crim. part. 2. N. 587. Pannormitan. in Cap. Cum illorum. 32. de sent. excommunic. As also Covarr. part. 3. relect. in clement. Si furiosus de Homicid. N. 8. vers. incip. tertio.* Where he cites not only *Bartol. & Bald.* but *Felin. Anton. R. Chassaneus* and others. With them likewise agree *Cabal. dict. cent. 3. resol. 236. N. 11. 110. and 118.* Where besides these above-cited, he cites *Capol. Angel. Castr. August. &c.* But although *Caballus dict. cas. 236.* has affirmed that *digitus non est membrum*, yet in *eod. cas. N. 109. 110. 111. & seqq.* he is forced to grant that if the hand be debilitated [meaning Mutilated] by Percussion of a Finger, one, two or three, that then *percussor tenetur de membro debilitato*; and says, he has often seen it so decided, and that he himself hath frequently decided so. Among the Physicians we find the above-cited *Zacch. dict. lib. 5. tit. 3. qu. 7. N. 12.* and the foresaid *Fortunat. fidel. derelat. med. lib. 2. §. 5. Cap. 2.* also for the Negative.
- 54 *Suarez. dict. disp. 44. de cens. Sect. 2. N. 6.* to establish a Rule for judging irregularity, seems to agree with the former D D. for there he says *Cui altera manus deest dicitur simpliciter mutilatus*. Whereas, in *cap. 2. de clerico agrot. presbyter, cui media palma manus cum duobus digitis abscissa fuerat, non dicitur truncatus membro, sed accepisse membri debilitatem & deformitatem; ergo proprie membrum solum est tota manus.*
- 55 But on the other side, there want not learned men, who affirm the Finger to be a Member, as *Cajetan. 2. 2. qu. 65. art. 1. and Sot. lib. 5. de justitia q. 2. a. 1.* & to prove it say, that it is not necessary to the Essence of a Member, in order to Mutilation [meaning Demembration], and irregularity, that it exerce a distinct Office and Action; but it's sufficient that it co-operat with a principal Member, and be assistant to it in its proper Actions; and subsume, that a *Finger*, although it cannot operat by it self without concurrence of the Hand, yet often it has something proper to it in the Action of the *Hand*, as in playing on a musical Instrument, in Writing, and the like; And if it were otherwise, then one Man should not be irregular, by cutting off anothers *Finger*, which is false, because by so doing, he much diminishes the integrity of the Body; And *Cajetan.* further says, that every organical Part which makes up the integral Body, is a Member in Order to Mutilation; and *Fingers* are such organical parts. Moreover, he says, all that is said of Mem-
bers

bers agree very well with parts of principal Members; and that there is no repugnancy between being a Member and the part of a Member, [meaning in order to Demembration.] And that the Gloss. in *C. cum illorum*; 32. *de sent. excom. verb. Mutilationem membri*; insinuates the same, saying in the like case, we must not distinguish between a Member and a Member.

Suarez. *diff. disp* N. 8. having related the Opinions of Cajetan. and Soto, steps in as a Reconciler, and approves their Opinion, in so far as concerns irregularity, and says, that the Physical Question, *viz. what is a Member?* and the Juridical, *what is to be understood by a Member in pœnal Laws?* do not at all concern the Case of Irregularity, which contents it selfe with a simple Mutilation, though it be not the Mutilation of a Member in the proper sense according to the forecited Clementine, and then affirms Mutilation [meaning Demembration] simply taken, is committed, when a principal Member is remarkably diminished, albeit not totally prescinded according to the Notion and Propriety of the Latine Word: and if at any time the Canons make mention of a Member; they always intimate that any Diminution is sufficient: and for this cites, *Cap. de cleric. pugnanti in duel. Ibi vel Memborum diminutio.* And Felin. in *cap. cum illorum de sentent. excom.* N. 3. Further the same Suarez. N. 9. *Ibid. in med.* distinguishes, and says that Abcission of one Finger is not commonly sustained sufficient, which, says he, is true if it be one of the two least Fingers; but if any other Finger be cut off, it is a sufficient Diminution, at least doubtful

The Reason why I have insisted so long on this Question, *And digitus sit Mem-* 57
brum? is, because I find it often debated in the criminal Registers upon the Authority of the DD. And now having shown their Opinions; I come to our Decisions on this Point: *viz.* a Lybel of Demembration was sustained for cutting off the Thumb of the left hand & three Fingers; 3. Nov. 1620. *Allan* against *Stewart*. Mutilation was also sustained when committed on the two foremost or first and second Fingers; 15. July 1642. *Laurence Cheyne* Brother to *Wallie* against *Mowat* and *Neivings*. And for mutilating of three Fingers; 5. Novem. 1618. *Dalgleish* against *Walter Scot*. And again a Lybel of Demembration was sustained for Amputation of three Fingers of the left hand; 14. September 1610. *Montgomery* against *Henderson*. And for the Amputation of two Fingers; 17. Dec. 1623. *Boyne* against *Hately*. And for the Amputation of two Fingers of the left Hand, 19. Novem. 1647. *Inglis* of *Craigmakerran* against *Martine*. And for the Amputation of the Thumb of the left hand 18. and 27. of June 1605 *Brown* against *Johnstoun*. and 12 of January 1642. *Taylor* against *Norie*. and 15. July 1642. fore said, Mr. *Patrick Cheyne* of *Wallie* against *Mowat* and *Neivings*. For Amputation of the Finger next the little Finger commonly called the Ring-Finger or *Annularis*; 8. March 1605. *Fowler* against *Lermont*. For Amputation of the Little-Finger of the Right-Hand, 27. Feb. 1618. by biting it off with his Teeth; *Thomson* against *Miln*; which is a greater length than Suarez. allows, who expressly excepts the Little Finger, and says that the Crime of Demembration is not committed by the Amputation thereof; *vid. num* 56. *supra*. In five of these Decisions, *viz.* *Allan* against *Stewart*, *Montgomery* against *Henderson*; *Dalgleish* against *Scot*; *Inglis* against *Martin*; and *Boyne* against *Hately*; The Defence that *Digitus non est Membrum* was propon'd and repell'd, notwithstanding of the Authority of *Bartolus*, *Baldus*, *Julius Clarus* and others, was urged; and the Reason of the repelling was in respect of dayly Practice: So that there remains no more doubt, with us, on that Question, whether the Finger be a Member in the proper sense, or not.

- 58 And certainly, the Decisions are very just and reasonable; Because the Hand discharges no Operation but by the *Fingers*; Further, if the *Fingers* be separated from it, it is of little or no use: And if the *Fingers* be distinctly considered, it will be found that each of them has it's own use. For, in the *Thumb* lyes the Strength of the whole *Hand*, and therefore is called *Pollex*, *quia aequè pollet omnibus digitis*; also *artixip*, because it is placed against the other *Fingers*, as if it were a *second Hand*; and is sometimes called, *parva manus*; by it we Write, Paint, &c. and it hath the chief use almost in all Actions: And if the *Pollex* or *Thumb*, with the *Index* or *Forefinger*, be both cut off, the whole hand is almost lost; for the three Remaining, *viz. Medius, annularis & minimus*, do rather co-operat with the *Pollex* and *Index*, than work by themselves, for of themselves they can do little to purpose, except in playing on Musical Instruments; their several uses, are best known by a mans Imployment; and according to that, the Judge should consider the Punishment: as we shall prove afterwards.
- 59 The Consideration of the Use of the *Fingers* to the *Hand*, hath mov'd some of the *D. D.* (who deny them to be distinct Members, yet) to acknowledge that *Mutilation* and *Demembration* may be committed upon them, but then when the *Fingers* are prescinded or mutilated, they think it should be said the *Hand* is demembred or mutilated: and not the *Fingers*, which, say they, are but Instruments of the *Hand* co-operating with it; and this seems to be the Meaning of *Suarez. dict. disp. sect. 2. N. 9.* And are the exprels words of *Fortunat. Fid. lib. 2: relat: med: sect. 5: c: 2. Mutilam particulam* (inquit) *nuncupare solet Galenus, non quia jam est abscissa, sed quia jam superest imperfecta. de morb: caus. 8.* where he cites *Galens* own words, *nemo ambigit quodejus quod superest partis est agritudo.* and so the whole Difficulty is resolved in a Question about a Form of Speaking, whether, when the *Fingers* are cut off, it be more proper to say the *Fingers* are demembred, or the *Hand* is demembred of the *Fingers*.
- 60 It's a wonder why the *DD.* should make so much work about this Question, when as the Laws they found on, give little, or no ground, for their Opinion. For, as to *l. 14: ff: de Statu.* The Scope of it, according to *Corasius*, is not to determine what is a Member, and what not, but to regulat Succession *ab intestato*, and to exclude from that Succession all Monsters and prodigious Births, *qui contra formam humani generis converso more procreantur*; as when a Woman brought furth a Calf or Monster with two Heads, whereof many were brought forth at that time, among the *Romans*. As to these *Paulus* the Author of the Law determines, they should not be numbered among Children: But if the Birth was not monstrous, *sed tantum membrorum humanorum officia ampliavit*; *ex. gr.* had six *Fingers*; such a Birth might be numbered among Children, and have the benefit of Succession: And therefore the said Text, as it's explained, affoords no ground for proving that *Digitus non est membrum.* And *l. 2. ff. de pub. jud.* and *l. si servi. Cod. de servis fugit.* speak not one word of Members. And the truth is, the matter of *Canonical irregularity* occasioned the most part of the Debate.
- 61 Having said so much upon the *digiti manus*, or *Fingers*, because we find it often debated in the Criminal Registers; it remains now that we speak something of the *digiti pedis* or *Toes*; As to which we have no Decisions in these Registers, but yet there is the same Reason to conclude, that the Crimes of *Mutilation* and *Demembration* may be inferred, when the like Violence is committed on them, that serves to constitute these Crimes as to the *Fingers*, because they are also of great use; for if they be cut off, a man can neither stand nor walk, as before, though he may in some measure do both;

nor to put his Body in such a Posture, as to be able to defend himself against the Assaults of his Enemies; nor to make his escape, when like to be overpowered. If only one Toe be cut off the inconveniency is not so great as arises to the Hand, by the loss of a Finger; yet the *Foot* hath a great loss by the want of the *Great-Toe*, and the Damage more than in the loss of any other; and next to that, is the Damage of the *Toe* next to it; and so in order, both as to *Fingers* and *Toes*; but still the loss of *Fingers* is esteemed greater, because they performe more Actions, and the hand is so noble a Member that when a Member is simply spoke of; the *Hand* is understood. *Zacch. Quest. medico-legal. lib:5: tit.3.q. 6.N.5.* and the Authors there cited by him.

And yet if we may give credit to the Authors cited by *Zacch. dict. q. 6. N. 9.* 62 we'll find that some men, born without *Hands*, have performed the like Actions with the *Toes*, as the Hand is in use to do. He cites *Alex. Benedict. Faree*, the famous *French* Chirurgeon, and divers others; making mention of persons, who Ate, Drank, played at Cards and other Games with their *Toes*; and of one that Stole, Rob'd, murdered with them, and suffered Death for so doing; and of a Woman that cut Cloath, Span, Sewed, &c. *Zacch. says, anno 1624.* he saw *Petrus Lucernensis* who wanting his Armes played on all musical Instruments with his *Toes*; and a Woman who anno 1627. performed the like Actions. If any desire to please himself with Examples of this Nature, he may peruse *Cardan. de subtil. & lib. 12. de variet. cap. 62.* as also *Schenckii. Hist. memorab. Monstrorum;* and *Wanely* in his wonders of the little world. *lib. 1. cap: 10. N. 3. & 6.* We only mention these to this end, to show that if such persons should exist among us and be mutilated or Demembred of Feet or Toes, the Crimes would deserve equal punishment as in the case of Hands or Fingers, because the prejudice is equal, except as to Deformity, which is more visible in the hands.

Its questioned among the D.D. if Precision of a withred Member infers the Crime and Punishment of Demembration? *Suarez: de censur. disp. 44. Sect. 2. N. 11. vers. Respondeo aliud esse. & versu. ideoque si alter postea.* And *Farin. Fragm. crim. part. 2. N. 597.* handle the same point (as to Irregularity) and conclude that he that detruncats a withred Member from his Neighbours Body, becomes no more Irregular by so doing, than if he had cut off the Member of a dead man; because the Member wanted Life in the one case as well as the other; but if the Member cut off had been a living (though a weak & wounded) Member, the Detruncator (say they) had become Irregular; but notwithstanding of what they conclude as to Irregularity (the causes whereof they labour to retrench, as I have said) yet such a Detruncation infers the Crime and punishment of Demembration, when the Question is concerning Punishment, and not Irregularity, and this is the expresse Opinion of *Caballus, resol. crim. cent. 3. Cas. 232. N: 77. & 78.* where he affirms, that albeit a Member want life, yet so long as it adheres to the Body, it's still a Member; as a withred Tree is always a Tree, so long as it stands on the Root; but after separation it's not called a Tree, but Wood: And for this he cites *Angel. Salicet. Fulgos. and Capol.* To this add, that if a Malefactor be sentenced to have a Hand cut off indefinitely, it is always understood of his withred hand, if he have one: *per Authent. sed novo jure. C. de serv. fugit. & ibi gloss. 2. in adit.* which could not be, if it were no Hand. This is also concluded by the laid *Cabal. dict. cas. N. 52. Jul. Clarus in pract. §. fin. q: 69. N. 4. Capol. in dict. Authent. N. 24. Carpz. pract. Crim. p. 1. qu. 40. N. 43:* and divers others.

The next Question is, if a man may be punished as a Demembrator, who cut off a Member of a dead mans Body out of a design to disgrace it? *Farin:* 64

Farin. loc. supra cit. N. 559. says it infers no Irregularity; so says *Covarruv. in Clem. si furiosus. p.2. in prin. N. 1. de homicid.* because the Member being dead, is no Member, or, rather, I say, because the separated Member was not cut off a living Body, as in the case immediately preceeding. *Majol.* (cited by *Farin. N. 600. ibid.*) and some others affirme the contrary, because if the person had been alive, the Delinquents malice would have led him to do the same; and *voluntas non actus, spectanda est. l. 1. §. 8. ff. de sicar.* Yet for all that I think the Crime of Demembration cannot be hence inferr'd seing Homicide could not be inferred by a wound in the Heart, which would have killed him had he been alive. *vid: Suarez. de cens. disp. 44. Sect. 2. N. 3. ad fin. vers. atque ita & N. 4. Farin. loco citat. N. 601.*

65 The use of all this Discourse, concerning proper and improper Members, is for understanding general Statutes concerning Members, without mentioning whether they are proper or Improper; For Example, if a Law or Statute Ordain, that one who cuts off, Mutilats or Debilitats a Member, shall be punished: that will not reach him, who cuts off, Mutilats, or Debilitats an improper Member. *Cabal. dict. Cent. 3. cas. 236. N. 16. 17;* unless says he, the contrary appear from the mind of the Statute, as if it run against him, who cuts off or debilitats ANY Member; in that case, says he, it would comprehend improper Members; because the Relative ANY, or ALIQUOD is general: and for this he cites *Bald. Fulgos. Castr. Capol. Angel. August.* And the like is asserted by *Bartolus, ad l. non sunt liberi. 14. ff. de Statu. viz.* That if there were a Law ordaining him that cuts off a Member; to be punished *panâ talionis*; it would not reach him who cuts off an improper Member; and *Pannormitan. C. cum illorum. 32. de sent. excommun.* follows *Bartolus*; and it doth not alter the case, whether the punishment appointed by the Statute, be Corporal, or arbitrary: the thing remarkable being only the generality of the Word Member.

66 All Judges competent in Homicide, are likewise competent in the Crimes of Mutilation and Demembration, and therefore not only are the Justices competent, but likewise Baillies of Regalities, Stewarts of Stewartries, and the Commissioners of the Borders. But sometimes where the Pursuit was first commenced before the Justices, they have refused to allow Repledgiation, as in the forecited case, 15. July 1642. *Chynie of Wallie* against *Monat and Nevings*, where the Justices did not allow *Sir William Dick Stuart* of *Orkney* (the place where they dwelt) to repledge, but recommended to him to agree the parties, and because he did not agree them, the Justices judged the Cause *ut supra.* The Justices allowe the Commissioners of the Borders to repledge; and so 11 June 1612. *Lord Cranston* repledged *Rutherford* pursued by *Weir*, for mutilating him of the foremost Finger of his left Hand; and yet the Justices did not admit of that Repledgiation till they had advised with the Privy Council.

67 Barons of Baronry are not competent Judges of Mutilation and Demembration; and therefore there being a Pursuit moved before the Justices, 10. July 1635. *Thomson* against *Gillespie* and others, for mutilating her of her right Hand, when she came to rid them; and they craving to be absolved, because the Laird of *Killhead*, as Baron Baillie to the Lord *Drumlanrig*, had judged the Cause; The Justices repelled the same, and remitted the Pannals to the knowledge of an Assize. Neither is the Privy Council Judge to these Crimes, more than to Murder; And hence it followeth, that if he who is guilty should be convened before the Privy Council, to be punished for that Crime as a Ryt; their Sentence would not hinder the Justices to judge it over again under the head of Mutilation and Demembration. 27. June 1605. *Johnston* against *Brown*, and 9. and 11. January 1628. *Memurran* against *Hamil-*

ton; where the case of *Johnston* against *Maxwel* of *Grubtown* Anno 1605. for assaulting the House of *Newbie*, was cited; but the *Justices* only continued the *Dyet*, because *Hamilton* the Pannel, was sick.

But though the *Privy Council* cannot decide cases of *Mutilation* and *Demembration*; yet they can precognosce and discharge the *Justices* to proceed; for this they can do in *Homicide* which is the greater Crime, and there needs no Proof of this, because it's dayly practised.

There are some *Cautions* to be observed in forming a *Libel of Mutilation*; 69 as first, Albeit it be sufficient in the case of *Homicide*, to libel that the Defunct was killed, ex:gr. on the first day of *January* 1698. or on one or other of the days of the said Month, or Months of the said year, yet in a *Libel of Mutilation*, the Day must be precisely condescended on, or declared at the Bar, which is equivalent. 10. *January* 1640. *Ker* against *Halyburton*; and the alternative [upon one or other of the Days of the said Month, or Months of the said Year] will not be sufficient; because the Pursuer cannot insist within Year and Day after the committing of the Crime; in respect the Law allows that time, to expect recovery of the Wound; as we shall prove in the first Defence.

Secondly, It will be convenient that in a *Libel of Mutilation*, ex:gr. of the Eye, the true matter of Fact by which the Sight was taken away be condescended on, and so in the foresaid Action 28. *July* 1643. *Logie* against *Howison*, the *Libel* bears, that the Eye was mutilated by a Stroke with a Tree on the Head; which brought a Defluction on the Eye, and occasioned a Blindness. If the *Libel* be so formed, it will the better quadrat with the *Probation*. and prevent all Cavillation, which may occur by reason of Difference that may happen between the Tenor of the *Libel* and *Probation*. I say it will prevent Cavillation; but I say not, that a *Libel* without this Condescendence will be rejected as irrelevant; for the contrary was found. 19 *Nov.* 1647, *Inglis* of *Craig-makeryen* against *Martin*; where the *Justices* found a *Libel of Mutilation* relevant without such a condescendence, notwithstanding it was urg'd that *Mutilation* falls no otherwise under the external sense, but by virtue of the Incisions or other Hurts from which it's inferred. But there will be greater difficulty in a *Libel of Demembration*, ex:gr. of a Leg; which was not cut off by the stroke or wound, but was crushed to that Degree, that the *Chirurgion* was necessitated to cut it off; for if the true matter of Fact be not libelled; but, in place thereof, it be said, that the Pannel cut off the Leg; then the Pannel will simply deny the *Lybel*, and consent it be found relevant, as conceived; and then when the Witnesses come to be examined, a Debate will arise upon the Interrogatories, for either they must be agreeable to the *Lybel*, or to the *Matter of Fact*: If to the *Lybel*, viz. whether they knew, that the Pannel cut off the Leg? they will depone negative; and if to the *Matter of Fact*, viz. if the *Chirurgion* cut it off, then it will be objected, that the Interrogatories are disconforme to the *Lybel*; and ought to be rejected; because the *Lybel* is found relevant as conceived; bearing that the Pannel cut off the Leg; whereas if the true Matter of Fact had been lybelled, viz. that the *Chirurgion* cut it off; the Pannel would have alledg'd and prov'd, that the *Chirurgion* did it ex malo regimine: Of which Defence he had no use as the *Lybel* was conceived: and so the Pannel being by the Conception of the *Lybel* depriv'd of that Defence, the Witnesses can only be examined upon the precise terms of the *Lybel*. And suppose the *Justices* do sustain the Interrogatories as they agree to the matter of Fact, viz. that the Pannel crushed the Leg and the *Chirurgion* cut it off, yet it may be after much Altercation, which may be preven'd by lybelling the true matter of Fact.

Thirdly ; It will not be improper in a *Lybel of Mutilation*, to say, that the *Member* was not only rendered useles at the time by the Hurt it receav'd, but that it remains still useles, never having recover'd: just as in a *Lybel of Reduſſion* of a *Bond* or other deed granted on death bed, its usual to say, that the *Defunct* dyed of the Sicknels and never went to *Kirk* or *Mercat* after he granted the *Bonds*; for by this negative (which proves it self) the burden of proving the Contrary, (viz. that the *Member* did recover its strength) is devolved on the *Pannel*.

Fourthly, If either *Mutilation* or *Demembration* be secretly committed that no *Witness* saw it, and the *Probation* be only by *Presumptions*, it will be very convenient to condescend upon the *Presumptions*, in the *Lybel*, that the *Justices* may give *Interloquitor* upon the Relevancie of them, and leave nothing to the *Affize* but to cognosce upon the *Fact* of those *Presumptions*, because it is hard in many cases to judge upon the relevancy of *Presumptions*. This Caution was practised in the *Lybel of Demembration* at the instance of the *Relict & Children of William Fenton* against *Montgomery*, upon which the *Lords Commissioners of Justiciary* gaveth their *Interloquitor*, dated 19. March 1690. finding the *Presumptions* relevant to infer an arbitrary *Punishment*, and remitted the same [*id est*, the matter of *Fact* of the *Presumptions*] to the Knowledge of an *Affize*, whereas if the *Presumptions* had not been lybelled, but had been first adduced before the *Affize*, it's a thousand to one if they had not given a *Verdict*, finding the *Lybel* not proved, because it concluded pain of death, on the account that the breaking of *Fentons Leg* was the cause of his death; which the *Chirurgeons* would not depone. I find a *Libel of Homicid*, 12. April. 1637. had been formed after the same manner; at the instance of the *Kings Advocat* against *Mcmaith*, for murdering a poor *Chapman* upon the Hill of *Corstorphine* where no witnesses were present and no other probation but presumptive.

Fifthly, there are some, both *Divines* and *Lawyers* who think it convenient in a *Lybel of atrocious Demembration* to conclude that the punishment of *Retaliation* may be corporally inflicted on the *Pannel*, (as was done in the foreſaid Pursuit, *Forbes of Leslie* against *Pitfoddels*) to this end, that if either the *Pannel* be solvent, yet unwilling to pay what the Judge shall think fit to modifie by way of *Affythment*: Or if he be *vilis persona*, or *indigent*: corporal punishment may be inflicted; In which last case the *Lawyers* say that *Paupertas facit pœnam pecuniariam commutari in personalem*. *Caball. dict. cas.* 236. N. 43. & 45. and this *Cantela* doth likewise answer to the design of *cap. 11. stat. Rob. 2.*

70 I come now to the *Defences*; some whereof are *Dilatory* and serve only to continue or delay the *Dyet*; others are *peremptory* which elide the *Lybel*. Of the first kind are these.

71 1. It's a good Defence against a *Lybel of Mutilation* that year and day is not elaps'd, since the Time lybelled of committing the Crime, this the *Justices* will sustain and continue the *Dyet* till Year and Day elapse, because by our Custom, as aforesaid, so much time is allowed to expect recovery. So they found 17. Decem. 1624. *Boyne* against *Hately* and 10. January 1640. *Ker* against *Halyburton* and *Crawmond*. It was also propon'd 9. and 11. January 1628. *McMurrin* against *Hamilton*, and in the above-cited 3. August 1647. *Forbes of Lesly* against *Pitfoddels*; but none of these two came to a Decision. The reply to this (if the Day of Committing be condescended on) is; that though the *Lybel* be raised within year and day, yet it's not insisted on, till year and day be elapsed; or in case a certain day be lybelled with an *Alternative* [of one other of the days of that Moneth or Moneths of the year] then the Reply is, that suppose count be made from the last day of that year, it will be found to be expired.

This

This Defence, that year and day is not elapsed, takes no place against a 72
Lybel of Demembration; because where a Member is cut off, recovery is not
to be expected, as was found, 27. Feb. 1618. Thomson against Miln, for
biting off her Finger.

If the Pursuit be both for Mutilation and Demembration, *ex. gra.* for mu- 73
tilating two Fingers, and demembring the Hand of other two: the Pursuer
may pass from the Mutilation, and insist within year and day for the De-
membration; as was found in the foresaid case 17. Decem. 1622. Boyne against
Hately, for demembring him of two Fingers and mutilating him of other
two.

The second Dilatory Defence is, that the Case is submitted: and the Inter- 74
loquitor in such a Debate is, to continue the Dyet, till the day of the Expira-
tion of the Submission; which may be either condescended on, and insert in
the Act of Continuation; or the Justices may put the Pannel under Cauti-
on to answer on fifteen days warning, in case the Submission take no effect; 14.
June 1626. Ord against Forbes; 15. June 1629. Paterson against Wordie;
and 20. July 1627. *inter eosdem*: From these two dilatory, two peremptory
Defences follow.

The first peremptory Defence is, that the mutilated Member is perfectly reco- 75
vered; in so far as the Pursuer makes use thereof as he did formerly: and it
will be fit to condescend upon the Deeds of Strength, which are the Evidences
of Recovery. *Ex. gra.* against a Lybel of mutilating of the Hand of the Fingers,
it was found relevant that the Pursuer had ridden up and down the Countrey, &
held the Bridle with that Hand and Fingers; and that he cut up Poultrie and
Geese at the Table, as he had been in use to do; 15. Dec. 1630. Barclay against
Kennedy in Mayboll, where the Defence being prov'd, the Affize cleans'd the
Pannel; and the Justices only fin'd him in an hundred Merks of Expenses for
the Cure. The like Defence was sustained in the foresaid Pursuit of Mutila-
tion. 3. Novem. 1621. Williamson against Marion Paton residenter in Leith,
for dislocating the Spondyls of his Back, and mutilating him of his Leg; in
which Pursuit the Justices found this Defence relevant to elide the Lybel, that
the Pursuer, being a young Boy, had in his usual Recreations with his Com-
rauds, run Races on the Links of Leith; as he was in use to do before he was
hurt. As also 6. June 1627. Lesly against Harvie, for breaking, at least laming
and mutilating him of his left Leg; this Alledgiance was found relevant,
that the Pursuer had walked from his House many Miles.

This Defence of Recovery, is only relevant against a Lybel for Mutilation; 76
for, as hath been said, Members once prescinded cannot be recovered; But
Gaspar Taliacotius, in his *Chirurgia nova de Narium, Aurium, Labiorumque de-
fectu*, pretends to have discovered a new Art of repairing Noses *per incisionem
cutis ex humero*. And Lanfrancus cited by P. Zacchias *quaest. medico-leg. lib.
5. tit. 3. q. 3. N. 3.* reports, that some had asserted that a Nose, which once
lay prescinded in the owners hand, was thereafter restored to it's place; but
he calls it an impudent Falshood. Yet Zacchias *dict. q. N. 1. and 4.* fol-
lowes Taliacotius; and cites Paree, and other famous Chirurgeons asserting the
same, and thinks this maybe usefull to Lawyers, for discussing cases of De-
membration. But seeing these learned Physicians do not agree about it, I re-
mit the case to be class'd *inter ea, quae raro & ex inopinato accidunt*; Like the
partus quinquagenaria, in l. *si major* 12. C. de legitim. Hared. and like Sera-
pia's Brth of five Children; in l. *utrum*. 7. ff. de reb. dub. which last, Aristotle
judg'd to be as impossible, ut in l. 36. ff. de solut. as Lanfrancus did the
restoring of the Nose; and seeing, if it exist, we cannot expect express Law to
decide anent it, (because Laws are only made for things *quae ut plurimum, &
non quae raro eveniunt*, l. 3. 4. 5. ff. de legib.) it must be then regulated
(when it happens) by paritie of Reason, with cases commonly existing, ac-

ording to l: 10: 11: 12. 13- ff: *ead.* And by the same Rule, the Judge may decide in the Amputation of the Toes of persons, formerly mentioned, N. 62. who use them instead of Fingers.

77 The second *peremptory* Defence is, that the case being submitted, the Arbiters have decreed, and the Pannel is willing to fulfill the Decree, or has already done it and obtained a *Discharge*; or that the Parties have *transacted* and agreed; this I say is relevant; for all Injuries become extinct by *Paction* or *Transactio* l. *si tibi*: 17: §: 1: l: *si unus* 27: §: *pacis* 4. D: *de pact.* l: *non solum* 11: §: 1: D: *de injur.* and was so found by the Justices 14: *Junne* 1637 *Allardice* against *Forbes* for mutilating him of his left Leg. In all these cases the Justices desert the *Dyet*, which is the proper terme of the Sentence proceeding upon *Transactions*.

78 The Justices do oftentimes recommend to the Parties to submit, so they did in the foresaid case 15. *July* 1642. *Cheyne* of *Wallie* and his Brother against *Monat* and *Neivings*, where *Sir William Dick Stewart* of *Orkney* compearing to repledge, the Justices recommended to him to agree the parties. Sometimes a judicial Submission is made to the Lords themselves, as was done 1. *Feb.* 1650. by *McLure* and *Baxters*.

Whence observe that the Crime of *Mutilation* and *Demembration* are but 79 *privata delicta*; whereanent Judges are not oblig'd to inquire. *dist.* §. 4. ff. *de pact.*: whereas publick Crimes cannot be transacted, *l. juris gentium* 7: & §. *pacis car.* 14: *init.* *vers.* *Et in ceteris*: ff. *ead.* and may be inquired in.

A third *peremptory* Defence is, that the King has remitted the Crime, 80 & ordered an *Assythment*; & the Pannel has found, or is willing to find *Caution* to pay the same as shall be modified; or that its already modified & consign'd: which Defence, as its usual against *Homicide*, so, is expressly sustained to suit the Pursuit of *Demembration* 17. *May* 1610. *Rob. Keith* against *Lindsay*.

Fourthly, *Diffimulation* (which is a tacit *Discharge* inferred from a friendly 81 converse and Acts of Kindness) is a good *peremptory* Defence. §. *ult.* *Inst.* *de injur.* l. *si tibi.* *de liber. caus.* But it must evidently appear that there is a design to pass from the Pursuit; and therefore in the foresaid case, 12. *January* 1642. *Taylor* against *Norrie* for mutilating of his *Thumb*; the Justices found that the Pursuers consenting to let the Pannel out of Prison and drinking with him, were no such Acts of *Diffimulation*; but perhaps there were some Specialities in the case: as that they convers'd and drank together for respect to the Company; and the letting out of Prison might be in order to meet for communing about an Agreement. But abstracting from these or the like Circumstances, friendly conversing & drinking together, is a strong Presumption of passing from the Crime, according to *Mathaus*; *Apud Germanos* (says he *dist. tit. N. 14.*) *propinatio poculi validissimum diffimulata injuria argumentum est.*

82 Fifthly, *res judicata* is an uncontroverted Defence; the Tryal being before the Justices who are the Judges competent: But (as I said before, N. 67.) neither is the *Privy Council* nor any *Barron-Court* Judge competent. *Act. 6. Parl.* 16. *Ja.* 6. And therefore their Decrees will not serve for an *Absolutor*; but if the Pursuer passes from the *Mutilation*, and insists for *Blooding* or *Wounding* only; *res judicata* before the *Privy Council* or an inferior Court, is sufficient; and if it be the *Sheriff's* Decree, and a *Reduction* of it raised, and a Reply upon the *Reduction*; the Justices will continue the Process for a time, till the event of the *Reduction* be known. So they did, 19. *Nov.* 1649. *Inglis* of *Craigmaherran* against *Martin*.

83 Sixthly, Its a good Defence that the *Privy Council* hath precognosced, found the Pannel innocent, and discharged the Justices to proceed. This is daily practice and needs no Confirmation; as was said, N. 68. *supra*.

Some-

Sometimes the Council remit to the Justices to precognosce, so they did 30. ⁸⁴
 July 1614. in a Precognition craved by Donaldson against Ronald Lorimer
 and other three persons, for demembring him of the Left Hand; and the
 Justices not being able to discover any thing, because the Fact was done in the
 Night, they remitted it to the Assize, who neither would fyle nor cleanse the
 Pannels, whereupon the Justices committed Lorimer to Prison, till they should
 advise with the Council, and then 16. Novemb. that same year, after advising
 with the Council, they pronounced Doom, that Lorimer should find Caution
 to satisfie Donaldson as the Council had ordained.

Seventhly, The alledgeance of Self-Defence is relevant here, as in Homicide; ⁸⁵
 and therefore as a Man may kill, in defence of his Person, his Wife, or her
 Honour. l. 1. §. 4. ff. ad l. Cornel. de Sicar. so much more may he mutilat or
 demember such an Invader: As was sustained 27. June 1605. Brown against
 Johnston, in which case Brown was mutilated in assaulting Johnstons House in
 the Night-time, with an Intention to abuse his Wife; and yet had the con-
 fidence to pursue for the Mutilation; whereas if Johnston had pursued Brown,
 then certainly Brown had been hanged; for 20. Feb. 1650. William Macrie Soul-
 dier, was convicted and hanged, for invading Colemans House on the like
 wicked Design. Also a Man may kill or mutilat in defence of his Goods,
 Covarw. de homicid. relect. 3. sect. Unic. N. 6. where he adduces many Texts
 of Law. As also a Man may Kill or Mutilat a Robber in the recovery of
 Stolen Goods, when he is flying with them. Att 100. Parl. 11. Jac. 6.

If a Man defend himself against one who is authorized by lawful Autho- ⁸⁶
 rity to apprehend him, that will not be esteemed Self-Defence, nor will he
 that mutilats in the apprehending be accounted a Mutilator. This was found
 anent the re-taking of a Souldier, who had run away from his Colours, and
 being pursued, drew his Sword and resisted, and was mutilated in the Re-
 sistance. 2. Decemb. 1641. Jarden against Edmonston. And just so will it be
 in the case of Messengers, in their lawful executing of Captions. See our Au-
 thor Tit. 11. of Murder. N. 13.

Eighthly, It's a good Defence that the Wound was curable, and that the Mu- ⁸⁷
 tilation or Demembration was ex malo regimine. This holds in Homicide,
 [see our Author, Tit. 11. N. 10. and Farin. de homicid. qu. 127. p. 3.] and
 much more in lesser Crimes. But if the Chirurgeon was necessitated to cut
 off the wounded Member, that will not excuse the Crime of Demembration;
 it being all one to cut off the Member by a Stroke or to necessitat the Chirur-
 geon to do it; per l. nihil interest 15. ff. de scar. And so it was found in the
 foresaid Action 27. Feb. 1618. Thomson against Miln, for biting off her lit-
 tle Finger. But there may be some difference in the forme of lybelling the one
 or the other; as, N: 69: sect: 2: supra.

Ninthly, If more than one be conven'd for Mutilation or Demembration, ⁸⁸
 as Actors, Airt and Part, all of them may be insilted against, and it will be
 no good Defence for any of the Pannels, that there is but one Wound which
 could only be given by one as principal percussor, who ought to be condescen-
 ded on, and first discusled. This was expressly propon'd for three Defenders,
 and repelled, in respect Airt and Part was libelled, 10. July 1635. Bessie
 Thomson and her Spoule against Gilespie, Thomson and Hill, for mutilating
 her of her right Hand when she came to rid them, they being all fighting to-
 gether: all three of them were remitted to the knowledge of an Assize. The
 like 24. July 1635. Fletcher of Benshaw against Ramsay, Lindsay and the Lord
 Spinie, in which Action the Lord Spinie compar'd and took the Fact on him
 and alledged that he was fyned by the Baillie of the Regality of St. Andrews,
 and yet it was repelled in respect of Airt and Part. And in the foresaid Acti-
 on 15. July 1642. and 5. August 1642. Cheinie and his Brother against Mowat
 and the two Neivings for mutilating them: all the three Defenders were

convicted and fined in 1000. *lib.* to the parties, and two hundred pounds to the King: and 3. *Novem.* 1620 in the foresaid Action *Allanfon contra Stewart* and others for demembring him of a Thumb and three Fingers, and giving him seven bloody wounds; it was alledged for *Stewart* that one of the Defenders was fugitive and at the Horn, and had thereby taken the Crime on him; and *l. si in rixa percussus* 17. ff. de *Sicar.* was cited, which was also repelled, and he was remitted to the knowledge of an Inquest. The like 6. *January* 1662. *Advocatus* contra *Bates* and others for Slaughter. And yet 10. *June* 1618. *Robertson* against *Ross* for mutilating him in his right hand, it being alledged for *Ross* the Pannel, that one was at the Horn for that Crime, and fugitive, the Affize cleard the Pannel; but the truth is there was no Probation in the case against the Pannel, and a testificat was produced under the hands of famous Gentlemen laying the Guilt on the Fugitive: See our Author, *tit.* 11. *num.* 12. speaking of *homicidium in rixa*, where many are conjunct Actors.

- 89 *Tenthly*, It has been anciently sustained for a Defence as well in *Homicide*, as in *Mutilation* and *Demembration*, that the Party killed or wounded was denounced Rebel, or, as we call it, at the Horn at the time for a criminal cause. This was found in the Action *Anno* 1610. *Ker* of *Ferneberst* against *Turnbull's* and others, and the extract of the Horning was found probative, and Relaxation was sustained by way of reply, to elide the Horning. The same was at length debated from the Civil Law, and *DD.* 20. *Nov.* 1618. *Meldrum* against *Meldrum* of *Eden*, but not decided. And is like the Question among the *DD.* If it be lawful to kill *Bannitus* or an outlaw? whereof he who desires to be satisfied may consult *Farinacius prax. crim.* q: 103: It seems that before the year 1612. a Defence founded on a Denunciation for a civil Cause was a ground of Defence, because by the third Act of the Parliament that year, it's statuted and declared, that for time coming it should not be lawful for any man to kill or mutilate any of the Subjects on the account of their being at the Horn for civil causes, under the pain of being punished as Murderers and Mutilators, with this Declaration, that the Act should take effect hereafter *allan-erlie* which implies that a Defence on an Horning for a civil cause, was good before. Our Author hath fully discussed this Question *dict.* *tit.* of murder, N:

19.
90 But before a Pannel at the Horn (for not finding Caution to compear) taken with Caption and presented to the Bar will be allowed to propound his Defences, he must relax. So it was found by the Justices 9. *May* 1605. *Skirven* against *Forrester*, for mutilating him of the Right Hand; where this Allegance that Defence was *juris naturalis* was proponed and repelled: But if there be any Nullities in the Horning, the Pannel may propound them; as was done in the said case.
- 91 *Eleventhly*, If the pain of Retaliation be expressly craved in the Libel (as was in the foresaid case. 28. *July* 1647. *Forbes* of *Lessy*, against *Pitfodds*;) the Pannel will be forced to debate how far the Law of Retaliation, given to the Jews, is obligatory upon other Nations; so it was there debated, but not decided. This Point I shall labour to clear hereafter.
- 92 *Lastly*, It's a good Defence, that the Pursuer did mutilat or demember himself; this (though contrary to the Libel) was found relevant 12. *January* 1642. *Taylor* against *Norie*; for mutilating him of his Thumb: against which the Pannel offered to prove that the Pursuer did mutilat his own Thumb when he was rashly drawing his Sword.

- These are the particular Defences, which I find in the Books of Adjournal; to which I may add this General: That whatever Defence is competent against
 93 Homicide, is also competent against Mutilation and Demembration; *mutatis mutandis.*

Now I come in order to speak to the *Probation* of the Libel and Defences, 94 which (in as far as it coincides with Probation in other Crimes) needs not to be spoken to. I shall only mark two things.

First, That as in an Action of *Homicide*, if the person said to be killed be 95 produced alive at the Barr; as in the case mentioned by *Annæus Roberius* *ver: jur. lib: 1: c. 4:* (and which was once done in a Pursuit at the instance of a Gentleman against his Neighbour, for alledged killing of his Shepherd, recorded in the Journal Books, but their Names escape me: then it would be very superfluous to prove by Witnesses, that the person said to be killed, is alive, because the Judge and Inquest see him: Even so in a Libel of *Demembration*, *ex. gr.* of an Hand, if it appear by ocular inspection that the Pursuer have both his Hands; as in the case of *Arsenius* said to be murdered, and demembred of a Hand, by *Athanasius*, and thereafter for vindication of *Athanasius*, brought in alive having both his Hands. *Socrat: eccl: hist: lib. 1. cap: 21:* and *Ruffin: l: 1: cap: 17.* I say in all or any of these cases, the Judge and Inquest can cognosce the matter by its notoriety; just so if an Hand said to be mutilated, appear by ocular inspection, never to have been mutilated, or to be perfectly recovered, the Judge & inquest need no further Evidences. So they did in the cases 28. July, 1627. *Pater-son* against *Wordie*, and 19. Novemb. 1657. *Inglis* against *Martin*.

But 2. If there be any doubt in the case; as falls out when the Hand or 96 Fingers are wounded; and no mutilation committed, but only pretended to be committed; the Truth in that case must be discovered: Either by the Oath of *Calumny* of the Party pretending to be mutilated; or, by Witnesses who saw him express Signs of recovery: as was done, *N: 76: supra:* Or, by the tryal of skilful Chyrurgions, who must declare their Opinion upon Oath, before the Judge and Inquest; and as this is our dayly Practice, so is it the custom of *forraign Courts*, as *Caballus* testifies in *di. cent. Resol. 3. cas. 236. N. 113. & seqq.* where he cites *Angelus* instructing Judges to advise with skilful Physicians and Chirurgions in ambiguous cases, how far the Member *ex. gr.* the Hand is mutilated or debilitated (for these two are but one and the same with him) by incision of the Thumb or other Fingers, and to record their Opinion or Report, among the *Acts* of the *Process*: And as *Caballus* relates this as the Advice of *Angelus*, so he says that he hath seen this frequently practised by Judges, and that he himself has often practised the same; and particularly that he has seen many Reports of skilful Chirurgeons concerning *Debilitation* or *Mutilation* of the Hand by Incision of the Thumb, or by Wounds given in the Fingers of the Hand, and sometimes by Amputation of two Fingers, so that the Hand ceased to exerce it's proper Office, and became almost unprofitable; and in all these cases, the *Delinquents* were condemned to undergo the punishments imposed by the Laws and Statutes of the Place where the Crime was committed.

The Justices, with us, do never accept of the single Testimonies of Physi- 97 cians and Chirurgeons; but oblige them to depone, or declare upon Oath; notwithstanding they have often contended, that the Oath *de fidei administratione*, they gave at their Admission was sufficient for all: So it was decided; 20. July 1627. *Pater-son* against *Wordie*; and for the same cause the Justices do reject Testificats subscribed by them, unless bearing upon Soul and Conscience. So they did 7 Novemb. 1621. *Williamson* against *Paton*; and 15. Decemb. 1630. *Barclay* against *Kennedy* in *Mayboll*, in which last case, the Testificat was subscribed by the Deacon of the Chirurgeons of *Edinburgh* and other two of the Trade. And the like Objection was made 12. January 1642. against a Testificat produced by *Taylor* against *Norie* to prove the Libel, notwithstanding it was written by the Clerk of the College of Chirurgeons, and subscribed by four of them. And that this is agreeable to the Opinion of the DD.

of Law and practice of Forraign Courts (what ever be pretended to the contrary) will appear by the following Citations of Law and DD. as *Crusius de indiciis delictorum*. p. 2. C. 20. N. 13. & *seqq.* *Mascard. de prob.* vol. 3. *conclus.* 1175. N. 40. *juncto* N. 50. *Baldus & Salicetus, l. hac editali.* 65 §. *his illud* 1. *de sec. nup.* and others cited by *Mascardus, diſt.* N. 50. *Farin. vol. decifion: crim. decif.* 346. N. 5. & N. 6. and *Decif.* 365. N. 1. and 5. *Vid. etiam* *Carpz. Criminal. p.* 1. *qu.* 21. N. 8. and *qu.* 20. N. 38. & *seqq.* and the DD. cited by him : As also *Matthæus de ſc: cap:* 3: N: 17: likewise *Gail: 1: obſ:* 111. N. 3. all of them asserting and proving that their Oaths should be taken. This was expreſſy enacted by a Conſtitution of Charles the fifth *Artic.* 149. cited by *Carpz. diſt.* N. 38. and decided in *Camera imperiali.* *Mynſyng. cent.* 6 *obſerv.* 34. *Vid. diſt.* *Crusium, loc. citat.* N. 19. and *Bald. in l.* 20. *C. de ſid. instrument.* And there should be at the least two of them, if they can be had. *Matthæus Ibid.*

There are ſome caſes wherein *Phyſicians* and *Chirurgeons* are not obliged to ſwear: as 1. If they be aſſumed by the Judge ; or 2. if they be choſen by mutual conſent of Parties ; to declare anent the nature of the Thing ; no more than a *tutor Teſtamentar* is obliged to find Caution, and the ſame Reaſon is for both ; *viz.* becauſe they truſt their Faith by choſing them. *Mascard. diſt. conclus.* N. 51. *Mynſyng. cent.* 5. *diſt. obſerv.* 34. N. 13. and 14. Or, 3. If the *Phyſician* or *Chirurgeon* be appointed by publick Authority, for ſuch buſineſs, and ſworn at the beginning. *Mynſyng. diſt.* N. 14. *Carpz. qu.* 26. N. 40. And ſo I underſtand *Matthæus*, ſaying, it's ſufficient they were ſworn at their entrie to their Office. *diſt.* N. 17. but withal they ſhould be put in mind of their Oath formerly given.

- 98 From hence it followes, that the Aſſizers who are to judge on a *Probation* wherein ſo many Difficulties occur, upon the Qualities of Wounds and Chirurgical Terms, ſhould be more than ordinary *intelligent* : otherwiſe they who in dubious Caſes incline to abſolve, may probably free the guilty upon ſome miſtaken point. This fell out in the foreſaid caſe 8. *July* 1643. *Logie* againſt *Howiſon* for *Mutilation* of an Eye: the Pannel was by them cleanſ'd upon a point that aroſe from the *Probation* ; *viz.* that the *Pursuer* gave ill words, & thereby provoked the Pannel to give the ſtroke which occaſioned the Blindneſs, and yet this was neither *pleaded* nor *relevant* ; for the Law does not allow *Compensation* betwixt *verbal* and *real Injuries*. And *Advocats* who plead theſe caſes, may likeways ſee how neceſſary it is for them to ſtudy the *Quæſtiones medico-legales*, without which it is not poſſible for them to underſtand ſome Texts in Law ; *l. 12. ff. de Statu.* And many other Laws in the *Titles ad leg. Aquil. & de Edil. edit.* But we need not give inſtances, ſeing the large Volume of *Paulus Zacchias* frequently above cited, contains hundreds of Inſtances. And *Matthæus, diſt: loc.* thinks it may be uſeful alſo for Judges to underſtand theſe things, that they be not eaſily deceived by the Reports of corrupted Chyrurgions ; and in order to this, he lays before them the 18 *Aphoriſ:* of *Hippoc: de vulneribus lethalibus, ſc: 6:* and the words of *Celſus, lib: 5: cap: 26:* as a particular caſe to be underſtood.

A
TREATISE
OF
MUTILATION and DEMEMBRATION
PART. II.

WHEREIN the Punishments of these Crimes are handled; *Retaliation*, which is the first of them, distinguished; and the Practice of that *Species* thereof called *Pythagorical* or *Arithmetical*, refuted; from the Opinion of Divines and Lawyers; and even from the Opinion of the *Rabbies*: The other *Species* called *Aristotelical*, *Analogical* or *Geometrical*, reconciled to natural Equity, and to the Law of GOD. The Punishment of *Amputation of a Hand*, though in many Cases practised, yet, rejected from being the ordinary Punishment of these Crimes. *Arbitrary Punishments* asserted in place of both; and a well regulated Arbitrary Power prov'd to be usefull and necessary to Judges, for augmenting and diminishing Punishments, in these and in other Crimes, according to Circumstances attending the committing of them. And the *Civil Law*, and the *Law and Customs* of this and other Nations are compared.

By Sir ALEXANDER SETON of PITMEDDEN Knight Baronet, &c.

By way of Appendix to the fore going Book, written by the Learned Sir GEORGE MACKENZIE of Roschamph.

ARRIUS MENANDER, L. 5. ff. de re Militari.

Non omnes Desertores similiter puniendi sunt, sed habetur & ordinis stipendiorum ratio, gradus militiæ, vel loci, numeris deserti, & ante actæ vitæ: sed & numerus, si solus, vel cum altero, vel cum pluribus deseruit, aliudve quid crimen desertioni adjunxerit. Item temporis, quo in desertione fuerit, & eorum, quæ post gesta fuerint: Sed & si fuerit ultro reversus, non cum necessitudine, non erit ejusdem sortis.

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PART II.

Of the Punishments of MUTILATION & DEMEMBRATION,

Summaries.

- 99 *The DD. insist chiefly on three Punishments: Retaliation, Amputation of a Hand; and Arbitrary Punishment: And the Law of this Kingdom Cap. 11. Stat. Rob. 2. declares the Life to be in the Kings Will and redeemable; which may be reckoned as a fourth.*
- 100 *Retaliation described; and its various Names.*
- 101 *The Subject is, Juridico-theological, equally handled by Divines and Lawyers.*
- 102 *The Nature of Retaliation held forth in some Conclusions.*
- 103 *Concl. 1. Retaliation instituted by God in his Law, and delivered by Moses to the Jews.*
- 104 *Concl. 2. The execution of the Law of Retaliation committed to the Magistrates, and not left to privat Revenge.*
- 105 *Concl. 3. The Law of Retaliation was transmitted from the Jews to the Grecians, but how or in what time is uncertain; some ascribing the Law to Rhadamanthus who was Moses in Mythologie according to Huetius; others to Charondas King of the Locrians; The words of their Laws set down.*
- 106 *Concl. 4. That Retaliation is founded on natural Equity, which consists in observing Equality between the Crime and Punishment; proved by five Arguments.*
- 107 *Arg. 1. Taken from the consent of Nations and Laws.*
- 108 *Arg. 2. Taken from the Testimony of Fathers, Modern Divines and Lawyers, asserting its natural Equity.*
- 109 *Arg. 3. Taken from various instances of providence inflicting Retaliation.*
- 110 *Arg. 4. Taken from Gods threatening Retaliation, against the Enemies of his Church in general, and the Chaldeans in particular: and also against his own people.*
- 111 *Arg. 5. Taken from the threatnings of Retaliation under the Gospel, which shows that the Law was not peculiar to the Jewish œconomie.*
112. *The Objections of Socinians and Anabaptists devised to overturn the power of Christian Magistrates answered: and the Authority of the Christian Magistrat asserted.*
113. *A farther proof by Instances of Providence under the Gospel, that the Law*

of Retaliation, was not abrogated under the Gospel; with a Reflection against the Deists denying the Validity of humane Testimony.

- 114 **Concl. 5.** *Although Retaliation be founded on natural Equity, and so is immutable, yet it doth not follow that it must be always executed according to pythagorical or Arithmetical proportion; but that Analogical or Geometrical proportion, as Circumstances require, is sufficient. And this proved by several Arguments.*
- 115 **Arg. 1.** *Taken from the Practice of the Jews in several particulars.*
- 116 **1.** *In many cases it was either naturally or morally impossible to execute strict Retaliation.*
- 117 **2.** *It was lawful for the Jews to transact anent the punishment of Retaliation. Josephus his Opinion disprov'd. And the Practice of the Justice-Court anent Transactions justified.*
- 118 **3.** *And for the same Reason, the Jewish Magistrat was not obliged to enquire into these Crimes, when the Parties did not desire it.*
- 119 **4.** *If the Party injured did apply to the Magistrat, and insisted to have the pain of strict Retaliation inflicted, yet then in that case, the Judge was not obliged to inflict punishment according to the words of the Law, but he enquired into Circumstances and varied the punishment accordingly. All this is prov'd by many instances; particularly where the Qualitie of Parties was unequal.*
- 120 **5.** *When Quality and Circumstances were equal (which seems to be the only difficult Case) even then the Jewish Magistrat did admit of a Ransome and pecuniary Mult^a for punishment, which was done on five accounts condescended on by the Rabbies. The Law of Retaliation, concluded to be minatory, with a Rebuke to the Sadducees and their Successors.*
- 121 **6.** *A false Witnes occasioning Death to another was punished with strict Retaliation; but if by his Testimony he occasioned only Demembration; the difficulty is greater.*
- 122 **Arg. 2.** *Taken from the Agreement of the Laws of the XII. Tabb. as paraphrased by Jacobus Gothofredus, with the practice of the Jews and Doctrine of the Rabbies in several Instances.*
- 123 **Inst. 1.** *The Law of the XII. Tabb. allowed Transactions, as well as the Jewish Practice.*
- 124 **Inst. 2.** *Depalination by the Law of the XII. Tabb. was punished by a pecuniary Mult^a, and not by strict Retaliation. And this was the Jewish Practice.*
- 125 **Inst. 3.** *The Law of the XII. Tabb. de offe fuso, vel dentibus excussis, appoints pecuniary Punishment: and the same was augmented or diminished according to the Quality of the Delinquent; which was also the Jewish practice.*
- 126 **Inst. 4.** *In the Agreement betwixt the Laws and Practice of the Jews, and the Law of the XII. Tables, in the case of a false Witnes.*
- 127 **Secondly,** *the Greek and Latine Authors; and particularly Aristotle and Phavorinus understood the Law, si membrum rupsit, &c. not strictly but analogically.*
- 128 **Phavorinus** *did not believe strict Retaliation practicable, but argues against it.*
- 129 **S. Cæcilius** *in his answer to Phavorinus acknowledges there cannot be an exact Retaliation in Breaking and Bruising, and therefore concludes for an Estimat.*

- ()
- 130 *An Epicrisis on the Reasonings of Phavorinus and S. Cæcilius.*
 - 131 *Strict Retaliation condemned by the Reasonings of Aristotle against the Pythagoreans.*
 - 132 *The Judgment of Aristotle to be preferred to that of Pythagoras; and why?*
 - 133 *Aristotle and Phavorinus censured by Bodinus, and he by Matthæus: and yet Bodinus no friend to strict Retaliation.*
 - 134 *The case of equal Circumstances considered by Bodinus.*
 - 135 *The Law of Charondas, of Eye for Eye, recorded by Diod. Siculus, proves not the general practice of strict Retaliation; it being not made for the sake of strict Retaliation, but with respect to the excellency of the Eye beyond other Members; and the like hath been since practised by Christian Emperours.*
 - 136 *Arg. 3. to prove that strict Retaliation though founded on natural Equity, admits of analogical Retaliation; taken from the authority of Divines and Lawyers; I begin with Grotius, eminent for his Knowledge in the Jewish and Christian Theology; and in the political Laws of both.*
 - 137 *The Testimony of Goodwyn & Ainsworth: Munster, and some Rabbies, cited by them.*
 - 138 *The Testimony of the Jews hath the more Weight, in that they were tenacious of their political Laws and Customes; as is prov'd by Instances; with the Opinion of St. Augustine and Isid. Pelusiot.*
 - 139 *A further Testimony of Goodwyn, for analogical Retaliation, following A. Gellius; with an Observation thereon.*
 - 140 *The Testimony of Paulus Fagius for the same.*
 - 141 *The Testimony of many other Divines condemning Pythagorical Retaliation.*
 - 142 *The Sadducees and wicked Manichees, Patrons of identical Retaliation.*
 - 143 *Strict Retaliation condemned by many famous Lawyers.*
 - 144 *Reasons why the Conference between Phavorinus and S. Cæcilius, recorded by A. Gellius, is to be regarded.*
 - 145 *The Law of Retaliation never executed among Jews, Grecians, or Romans in the strict sense; except the Crime were atrocious: Moderat Damages more agreeable to Christian meekness.*
 - 146 *First Objection bearing, that if strict Retaliation had not been among the Jews, there would have been no need of Exhortation to Meekness under the Gospel; answered.*
 - 147 *A second Objection taken from these words of l. 1. ff. ad leg. Aquil. Lex Aquilia, omnibus legibus quæ ante se de damno injuria loquutæ sunt, derogavit, five XII. Tab. five alia quæ fuit; enforced and answered: by shewing that the words omnibus derogavit, admit of Exceptions.*
 - 148 *The Answer illustrated by an Enquiry into the Date of the Lex Aquilia.*
 - 149 *The use of the Enquiry for knowing the Author of the Lex Aquilia.*
 - 150 *Amputation of the Hand is the second Punishment of Mutilation and De-membration to be spoken to; and why?*
 - 151 *Amputation of the Hand prov'd by many Instances of the Civil Law, to be the punishment of many Crimes committed by the Hand; and how that punishment is to be regulated?*
 - 152 *The punishment of Amputation of the Hand, is always in Saxony conjoyn'd with Relegation; and why?*

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- 153 *An Argument taken from the Gloss and some Texts of the Feudal Law, to prove that Mutilation and Demembration, were punish'd poenâ amputationis manûs, because single wounding was so punish'd.*
 - 154 *The Argument taken from the words of the Gloss put in form, and enforced from a Rule in Suarez; and answered, by shewing that single wounding was never punish'd, in that manner, unless joyn'd cum fractione pacis publicæ, to which the Law requir'd several Conditions there set down, which made the Crime atrocious.*
 - 155 *Some Acts of Parliament, anent the Amputation of the Hand for carrying forbidden Weapons, explain'd.*
 - 156 *An Objection answered.*
 - 157 *Arbitrary Punishment, by the Civil Law, succeed'd in place of Retaliation, and in place of the fix'd Mults of the XII. Tabb. If these Mults were enacted in maximâ veterum paupertate? (as Trebonian says) and abrogated on that account? For what Cause were the Words of the Law Si membrum rupsit &c. abrogated?*
 - 158 *How long had Analogical Retaliation been in practice before Justinian introduc'd Arbitrary Punishment in place of all Retaliation?*
 - 159 *Mutilation and Demembration punish'd arbitrariè, as other Injuries:*
 - 160 *The nature of Arbitrary Punishment not understood by every one.*
 - 161 *Arbitrary Punishment answers to Arbitrary Crimes. Ordinary and Arbitrary Crimes described.*
 - 162 *Anciently all Crimes and Punishments were determined by Law; but multitude of Facts which could not be foreseen gave occasion for Arbitrary Power to determine in Emergencies by the Rules of Equity.*
 - 163 *This ancient and modern Custom, and the nature of Arbitrary Punishment held forth by Ulpian. Why a Judge call'd Legis auxilium?*
 - 164 *Punishment in general as including ordinary and extraordinary or Arbitrary, described.*
 - 165 *Arbitrium plenum or absolute; and regulatum or limited, described. A Judge, exercising unlimited power, call'd bellua & non iudex.*
 - 166 *Absolute, and Arbitrary power, are different things and have different Effects.*
 - 167 *An Arbitrary Judge, is the same with a prudent and wise Judge described by Cicero; and is the same with Ulpian's vir bonus described by Alex. Neapolit.*
 - 168 *An Arbitrary Judge has not power to do any thing that is unjust.*
 - 169 *He cannot, without a just Cause, augment or diminish punishments which the Law has determined, nor recede from any thing determined by Law, unless the Law allows him to do it. What cases are said to be determined by Law?*
 - 170 *He cannot totally remit a Punishment to gratifie the people, especially after Sentence. And its not always safe for them to remit, who have power to do it; prov'd by the authority of St. Bernard and Cicero.*
 - 171 *An Arbitrary Judge cannot punish beyond merit.*
 - 172 *He cannot punish one man for the Fault of another, though he were willing to undergo it: except in some particular cases.*
 - 173 *He should not delay execution of Sentence beyond the ordinary time.*
 - 174 *If Arbitrary Punishment can reach ad poenam Capitis?*
 - 175 *If ad amputationem manûs?*

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- 176 An Arbitrary Judge may determine Punishment for extraordinary Crimes; and highten or lessen punishment in ordinary Crimes, if the Circumstances of Fact require it: and why?
- 177 There is a like necessity for Arbitrary Power in some civil Cases.
- 178 And yet for all this the Judge cannot be said to be more favourable than the Law; or that he contraveens it, or departs from it; but is rather Legis auxilium, and a Preserver of the Law, because the Law in some cases gives him that power.
- 179 Only Supreme Judges have this power; and inferior Magistrats must consult the Prince, especially after Sentence pronounced. Whether the Judge be oblig'd to express the Causes of his receding from ordinary Punishment? how far the Law presumes for the Justice of the Judge in ambiguo.
- 180 The Circumstances for hightning or lessening Punishments, are chiefly seven: Causa, persona, locus, tempus, Qualitas, Quantitas, Eventus.
- 181 1. Divers Considerations anent the Cause, viz. 1. If the Delinquent acted ex proposito, or not. 2. If the Crime be consummated or attempted only. 3. If the Delinquent acted of his own accord, or by command of another. What the Judge ought to do in each Case.
- 182 2. As to the Person whether Agent or Patient, it makes a great alteration in Punishment. Each should be considered as to Sex, Age, State, and Quality or Dignity.
- 183 3. Place; of Committing, augments or diminishes the nature of the Punishment; prov'd by Instances.
- 184 4. Time; varies the Punishment: which is also prov'd.
- 185 5. The Quality of the Fact makes the Crime more or less atrocious, and varies the Punishment.
- 186 6. Quantity; distinguishes furtum ab abigeo.
- 187 7. Event encreases punishment and Damages; as when the hand of a skilful Artificer is struck off.
- 188 Damages are due by the Rules of natural Equity; proved by the Authority of Farin. and Marfil.
- 189 How far Delinquents are lyable for Damages, intrinsic or extrinsic; and both these Damages described.
- 190 Obligation to pay Damages founded on Exod. 28. 19.
- 191 Damages to be modified at the arbitrement of the Judge; and by what means he should inform himself. Other five Circumstances for mitigating Punishments.
- 192 Of the Practice of Scotland anent punishing Mutilation and Demembra- tion; and decerning of Damages: The words of Cap. 11. Stat. Rob. 2. which are the foundation of all, set down.
- 193 If there be any Warrant, from the words of the Statute, to punish Mutilation and Demembration capitally; debated pro & contra, and resolved Negative.

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I Have now done with the first Part of this Appendix; and therein I have shown what it is to Mutilat and Detruncat a proper Member of a Mans Body; and how to pursue and defend Actions thereanent. I come next in this second Part to speak of Punishments and Damages; which are not always the same, but vary, in these as in other Crimes, according to Circumstances; tot. tit. ff. de pœnis. Farin. 11. 87. & seqq. de pœnis temperand. The DD. insist chiefly on Retaliation, Amputation of a Hand; and arbitrary punishment; and there is a Fourth, mentioned in an ancient Statute of our Law, viz. cap. 11. stat. Rob. 2. where it's said, that for wilfull and premeditated Mutilation (which is there understood for Demembration) the Delinquents Life shall be in the Kings Will and redeemable.

Retaliation; which is the first of these, is a Punishment of equal Retribution, or the doing to one as he hath done to his Neighbour; instituted by GOD; committed to the Jewish Magistrat for Execution; and thereafter received by the Gentile Nations, upon the account of it's natural equity, and executed by the Rule of Geometrical Proportion. All which I shall make appear in several Conclusions. Cardinal Hugo on Exod. 21. 23. thus expresses it; Talitur ladendus est justè, qualiter ipse injuste fecerit alii. Pœna talionis is not expressly mentioned among the Laws of Justinian; except in §. pœna 7. inst. de injur. but we find it in Novel. Leon. 60. & 92. The Reason why it's but once in Justinians Law, is, that when Trebonian composed the Law, Retaliation of one Member for another was worn out, and in place thereof actio injuriarum had succeeded, as in dist. §. Pœna. It's oftner in the Canon Law, as in C. Pœn. 14. q. 1 and in C. sex differentia, 22. q. 3. and in C. calumniator. 2. q. 3. but it's frequent among the DD. as fol. Clarus, Farinacius, Cujac. Bart. Bald: and others. And among the Rhetoricians; as Quintil. declam. 297. & 352. Senec: Controvers. 2. lib. 3. & controv. 33. lib. 5. and it's to be found in Symmach. Epist. 59. lib. 1. & Epist. 27. lib. 3. and Sidon. Epist. 3. lib. 5. and the Essence of it consists in the cutting off one Member for another, as appears by the punishment of him who makes an Eunuch: Novel. Justin. 142. Cap. 1. It hath it's name from the Latine word Talis. Voss in Etymol. which denotes an Equality betwixt the Crime and the Punishment; and for this Cause it's likewise call'd pœna similis supplicii; in l. ult. c. de accusat. & l. ult. ff. de calumniat. Pœna reciproci. in l. 3. lib. 9. c. Theodos. de exhib. vel transmit: reis. And pœna paris vindiçæ; quasi ταυτοταβια, or the suffering of the same thing. It is several times called by Aristotle οὐκ ἰσότης lib. 5. Ethic. cap. 5. i: c: contrapassum: All these are Names denoting Equality.

The Subject is Juridico-theological; and therefore in handling of it the DD. of Theologie cite Law and Lawyers; and the DD. of Law cite the Sacred Scriptures and Divines, which must be my Method at present; For as in the first part I made use of Physicians to assist the Lawyers; so in this second Part I must call Divines to my Assistance.

And because the Subject is full of Difficulty, especially as to the Obligation of the Law of Retaliation under Christianity, I shall labour to clear the Difficulties in a few Conclusions, whereby the divine Authority and natural Equity

thereof shall be proved in the first place, and yet it shall be shown in the second, that it was not intended to be always executed in the strictest and literal Sense, but according to the Rules of Geometrical Proportion and distributive Justice.

103 1. All, except *Deists* who deny the Authority of the Books of *Moses* and reproach this Law, (as you may see in *Nichol's Dialogue with the Deist*) acknowledge that the Law of *Retaliation*, was one of the Laws which *Moses* received from God, and delivered to his People the *Jews*. For first God gave this Law to secure the Life of man *Gen. 9: 6.* in these Words, *He that sheddeth mans blood, by man shall his blood be shed*; and having declared it to take place in all cases of wilful Homicide, *Exod. 21. 22. 23. 14. 18. 19. 20. 21. 22. 23.* with Certification in the last of these Words, that *Life should goe for Life*. He thought fit, by a further step of his wise providence, to forbid *Demembration* under the like pain. *vers. 23. Eye for Eye; Tooth for Tooth; Hand for Hand; Foot for Foot.* As also *Mutilation* and lesser Hurts, *v. 25. Burning for Burning; Wound for Wound; Stripe for Stripe*: These are the Words of the first Institution of the Pain of *Retaliation*; which is renewed *Levit. 24. 19. 20: If a man cause a Blemish in his Neighbour as he hath done, so shall it be done to him; Breach for Breach; Eye for Eye; Tooth for Tooth: As he hath caused a Blemish in a man so shall it be done unto him again.* Further, lest this should be thought to reach the *Persuador* only; It's declared *Dent. 19. 6.* and subsequent Verses, to extend also to a false Witness, by whose false Testimony the Life or Member of an innocent man should be taken away. All these places of Scripture serve to illustrate the above mentioned Description of *Retaliation*; because the very words in the Texts *Eye for Eye, Tooth for Tooth, &c.* are as so many Examples of the Equality to be observed in Execution of the Law either Literally; or Analogically, by geometrical Proportion.

104 This Law was not a business of private revenge, and therefore the executing of it was not committed to the Party injured (as some Commentators on *Math. 5. vers. 38: 39: &c.* charge upon the Sadduces) *nullo enim modo servaret ille modum*, says *Estius* in *Exod. 21. 23.* but the Execution was committed to the Magistrat; for *Dent. 19: 17.* it's expressly said, that both the men between whom the controversy is, shall stand before the Lord, before the Priests, and the Judges which shall be in those Days. And all private Revenge, yea even private hatred, was expressly forbidden the *Jews*. *Levit. 19. 17. 18. thou shalt not hate thy Brother in thy heart: thou shalt not avenge nor bear any grudge against the children of thy people,* And the Roman Law, *tot. tit. C. Ne quis in sua causa*; permits no man to judge in his own cause, except supreme Judges.

105 3. This Law of *Retaliation*, with many others of the Jewish œconomy, was transmitted to the Gentile Nations, and particularly to the *Grecians*, (who were the most learned and polite of all others,) but it is not agreed upon, neither as to the manner how, nor the time when, the *Grecians* received them. *Dan. Huetius*, in his Book intituled, *Demonstratio Evangelica prop. 4. cap. 8. n. 2.* cites Authors, who say, they might have received them from *Cadmus* and *Danaus*, who being contemporaries with *Moses*, were forc'd to fly from their own Country of *Ægypt*, and sheltered themselves among the *Grecians*, and taught them those Laws. And he *dict. prop. cap. 11.* insists at large upon the transmission of these Laws to the *Grecians* by the *Syrophenicians*; but Authors (whom he cites) do not agree about the time. Some think it was when the *Syrophenicians* fled from the Sword of *Joshua*, invading

ing their Country; others think, that the Syrophenicians themselves had never learned these Laws, before Solomon sent many thousands of his People to provide Materials for the building of his Temple, 1 King. 6. But the Grecians had the Law of Retaliation long before this time, if credit may be given to the Pythagoreans, who (as Aristotle says, lib. 5. Ethic. cap. 5.) ascrib'd this Law to Rhadamanthus King of Lucia as its Author, in these words, *Quod quisque fecit patitur; autorem scelus repetit; suoque premitur exemplo nocens*: I say, it must be older than Solomon: if Rhadamanthus enacted it, for Turse-
linus in his *Epi. Hist.* makes him contemporary with Joshua: and according to Huetius, *di. c. 8. N. 12.* he was the same with Moses. Calvinus, Helvius and Nauclerus calculat him to be about the same time. But Diod. *Sicil. lib. 12.* ascribes the Law for the Eye, *Si quis oculum eruerit, oculum reo pariter eruito*, to Charondas King of the Locrians, surnamed *Thurius*, (because he gave Laws to the Thuriens or Tyrians. Tiraquel. in his Notes on *Alex. ab Alex. lib. 6. di. genial. c. 10.*) and then, as to that particular Member, the Law was of a later date. But leaving these Chronological Inquiries, because the Heathen Histories of these times, from which they are taken, are very uncertain; according to the learned Stillingfleet. *Orig. Sac. cap. 1. in fin.* It's enough for our design that we find the Law of Retaliation, among the Grecians; and no man will deny this who reads Aristotle *di. 1. 5. Eth. cap. 5. Demosth. in Timocr. Diog. Laert. lib. 10.* And Huetius *di. prop. 4. C. 11. p. 161.* is positive, that the Law of Retaliation, was one of the Laws which descended from the Jews to the Grecians, & transmitted by them to the Romans in the XII. Tables, l. 2. §. 44. ff. *de orig. jur. anno V.C. 300.* whereby it is agreed, that it was a Law anciently among the Grecians, and that they honoured it for its equity, by ascribing the general Law, *Quod quisque fecit patitur*, to Rhadamanthus, and the particular Law, *Si quis oculum eruerit*, to Charondas; both fam'd for their Equity and Justice, as Virgil. *Æneid. lib. 6.* and the Mythologists testify of the first; and Val. Maximus testifies of the last, lib. 2. cap. 5. but by instancing a Heathenish piece of Courage.

Conclus. 4. This Law of Retaliation is founded upon natural Equity; which consists in observing equality between the Crime and Punishment. This I prove by the following Arguments.

Argum. 1. Common consent of all Nations in the receiving a Law, is a good Argument for its natural Equity; and all Nations have agreed to receive this Law. This we have already shewn, as to the Grecians and Romans, N. 105. *supra.* As for other Nations, their receiving this Law of Retaliation, see Dempst. lib. 9. Rosin. in *paraleip. p. 940.* Cujac. lib. 7. *observ. cap. 13.* P. Herodius, *rerum judicat. lib. 6. tit. 5. de injur. c. 20.* Forner. lib. 3. *select. cap. 28.* Faber. lib. 3. *Semest. cap. 19.* and Covarruv. *var. Resolut. lib. 2. cap. 9.* Moreover, the Authors of particular Texts in the Roman Law are positive in this point of natural Equity; as, Ulpian. in l. 1. ff. *quod quisque jure*, who there says, *Quis aspernabitur idem jus sibi dici, quod ipse aliis dixit.* And the foresaid Joannes Suarez. *di. cap. N. 7.* says, that he believes the Prator introduced the Law of Retaliation against the Magistrat; who contrary to his duty, decerned unjustly; and therefore an *anonymus* German in his Book intitled, *Jus ff. illustratum*; inscribes his Notes upon that Title, in these words: *De jure talionis sive re-torsionis.* See Maranus (*Cujacius* his Scholar) on the same Title. And S. Cæcilius apud A. Gell. lib. 20. c. 1. disputing for the Equity of the Law of Retaliation in the XII. Tables, against Phavorinus, has these words, *Quæ obsecro, ista est acerbitas, si idem fiat in te, quod tute in alios feceris?*

Arg. 2. It's natural Equity is asserted by many great Authors, as by S. August. lib. 21. *de Civit. Dei. Cap. 11.* Expostulating with the Gentiles who laboured

from the natural Equity of this Law to confute the belief of Eternal punishment: as if it had been disproportional to a temporal Sin; not knowing, that the Sin was measured from its being against an Eternal Majesty, Infinite in Justice. Of this Opinion also are, *Gratian: in C. penas 14. qu. 1. & in C. sex differentia 23. q. 3. Tertul. lib: de patientia cap. 6. Origines, homil. 10. in Exodi D: Ambros. lib. 1: officior. cap. 48. D. Valerianus in serm. de bono disciplina. S. Isidorus pelusiota lib. 2. Epist. 133. Abulensis in cap. 24. Levit. all cited by Johannes Suarez de mendosa ad L. Aquil. C. 2. in apparatu N. 6: where he says plane hac de talione lex non solum bonos sed æquo convenit; quia in pænæ æqualitate versatur, sed nulla esse reperitur, quæ magis secundum naturam sit: nitebatur enim naturali hac ratione quæ æquissima omnibus visa est; nimirum quod in se patiatur quisque, quod fecerit alteri. And again N. 8. Igitur cum hæc lex naturali ratione suffulta sit. Inde est quod omnes Gentes eadem lege regerantur, & ab omnibus per æquæ custodiebatur. And this Answers exactly to the Definition of natural Equity given by Aristotle lib. 5. c. 7. where dividing jus in quæritur & requiritur, naturale & legitimum, he calls naturale, quod ubique eandem habet vim, & non quia sic videtur aut non videtur. And legitimum, quod initio quidem liberum est, postquam vero constitutum sit, observari necesse est. This natural Equity is also asserted by learned Divines, Andreas Rivetus ad Exod. 21. 24. N. 3. 4. And Antonius Walæus oper. tom. 2. p. 290. col. 2. as also by Soto, tractat de inst. & jur. lib. 5. art. 4. in the case of punishing Accusers; and by Episcopus, inst. l. 3. Sect. 2. c. 12. The same is also maintained by Farin. prax. crim. qu. 16. de accusat. N. 2. and by Vander Muelen: p. 2: qu. 15.*

109 Arg. 3. As this is evident by these many Authorities, so it is proved by the following Acts of Gods special providence and vindictive Justice executed, by the Rule of Retaliation, against heinous Offenders, and notorious Malefactors; as upon Pharaoh, by drowning him and his Host in the Red-sea, in Retaliation of the Command to drown the Male-Children of Israel. Exod. 1: 22: In like manner Adonibezek King of Bezek who had cut off the Thumbs and great Toes of 70 Canaanitish Kings, had his own Thumbs and great Toes cut off by the Tribe of Judah, Jud. 1: 6, 7. where he acknowledges the justice of GOD in this Retaliation, saying, AS I have done, SO GOD hath requited me. And when Samuel hewed Agag the King of the Amalakites in pieces before the LORD, 1 Sam. 15: 33: he said unto him, AS thy Sword hath made Women childless, SO shal thy Mother be made childless among women. These three were Gentile Kings, who could not suffer by the Law of Retaliation as it was a Law of the Jewish æconomie, but as it was a Law of natural Equity. We have another Example of the executing of this Law by virtue of its natural equity, even before its Promulgation by Moses, viz: upon Josephs Brethren; they had cast him in a Pit, and had no regard to the Intercessions made by him, or for him: Gen. 37: 21, 22, 23, 24: and he again on another occasion (but with a better design) had no regard to their Intercessions, but cast them in Prison, Gen. 42. 9, 10, 11, 12, 13, 14, 15, 16, 17. and verse 21. they acknowledge the Justice of this Retaliation, saying to one another; We are verily guilty concerning our brother, in that we saw the anguish of his Soul when he besought us; and we would not hear, therefore is this distress come upon us.

110 Arg. 4. The natural Equity of this Law is prov'd by GOD's threatening to retaliate upon the Enemies of his Church in general, Isa. 33. 1. When thou shalt cease to spoil, thou shalt be spoiled; and when thou shalt make an end to deal treacherously, they shal deal treacherously with thee. And against the Chaldeans in particular, Habak. 2. 8. Because thou hast spoiled many Nations, all the Nations of the People shal spoil thee. And not only did GOD threaten the Heathen Nations, but even his own People the Jews, Dent. 32. 21. yea, even

even David himself, 2 Sam. 12. 9, 10, 11. Sword for sword, defilement for defilement. And Solomon tells us, Prov. 21. 13. Who so stoppeth his ears at the cry of the Poor, he also shall cry himself, but shall not be heard. A Threatning worthy to be observed in this time of Scarcity.

Arg. 5. If the Law of Retaliation had not been founded on natural Equity, ¹¹¹ but had been meerly for the State of the Jews, then it could not be obligatory under the Gospel, but it is obligatory; as appears from Matth. 7. 2. With what judgment you judge, ye shall be judged; and with what measure you met, it shall be measured to you again. And Revel. 13. 10. He that leadeth into captivity, shall go into captivity; and he that killeth with the sword, must be killed with the sword. And many Nations observe it in particular Cases.

And whereas it is Objected by the Socinians and Anabaptists following them, ¹¹² out of design to overturn the Power of the Christian Magistrat, that Christ's own words, Matth. 5. 38, 39, 40, 41. do abolish this Law. It's Answered by Rivetus, *dis. loc. Ex. d.* and by the judicious Calvin; by Marlorat, Maldonat and others on our Saviour's words, Matth. 5. 38, &c. and by Lorinus in Levit. 24. 19, 20. that all that Christ intended, was to recommend Christian Meekness and Patience, but not to wrong the Power of the Magistrat, which is frequently asserted under the Gospel; as Tit. 3. 1. 1 Pet. 2. 13. and Rom. 13. 1, 2, 3, 4, 5. where we are commanded to be subject to superior Powers, who are a terror, not to good Works, but to the evil: and *vers. 4.* He bears not the sword in vain, for he is the minister of God, a revenger to execute wrath upon him that doth evil, and therefore we are to be subject, not for servile fear only, but for conscience sake. Farther, Calvin and Rivetus say, that Christ intended to correct an error of the Pharisees, who believed that the execution of the Law of Retaliation was committed to every privat person; but Maldonat on the Text dissents from this, thinking the Pharisees could not be ignorant of the Prohibition, Levit. 19. 17, 18. Thou shalt not hate thy brother in thy heart; and thou shalt not avenge, or bear any grudge against the children of thy people.

Further, to show that this Law was not abrogated under the Gospel, GOD ¹¹³ by many acts of his special Providence has inflicted the punishment of Retaliation under the Gospel; as in Herod, who Matth. 2. 16. sent forth and slew all the children in Bethl. hem, among whom (he that should have succeeded him) was also slain. *Vid. M. cr. b. lib. 2. Saturn. cap. 4.* and Spinhem. his disquisition upon it, *d. b. evang. Vol. 2. dub. 76.* As also, the Daughter of Herodias who contrived the beheading of John the Baptist, Matth. 14. was (as she passed a River) beheaded by the Ice, holding her fast by the Neck, whilst her Body danced under the Waters. *Niceph. lib. 1. histor. cap. 20.* And the Jews, who concurred in the wicked crucifying of our blessed Lord, were crucified in great numbers dayly at the Siege of Jerusalem, by Titus the Son of Vespasian. *Jos. ph. de Bello Judaico l. 6 cap. 12.* And Valens the persecuting Arian Emperour, may be adduced as another Example, who having burnt fourscore Orthodox Christians coming from Constantinople to Nicomedia unto him, humbly to plead their Cause, was himself at last burnt in a little Cottage, where he had hid himself, when flying from the Goths; *Socrat. Hist. Eccl. l. 4. c. 3.* And some later Examples are recorded by Camerarius in his *Historical Meditations cap. 98.*

After all which Proofs, the natural Equity of this Law is not to be doubted; so that the Deists, who object this Law as a foolish and unjust Law, to refell the authority of the Books of Moses, may see that the Gentile Nations have honoured this Law, if credit may be given to the best humane Authority; which if the Deists reject, (as often they do, for supporting their Cause)

they will not be able to prove who are their Fathers, and so may, after their death, lose the Right of Succession.

114 *Conclus. 5.* Tho' it be proved that *Retaliation* is founded on *naturalequity*, and so is immutable, yet nevertheless it will not follow that it must *always* be executed according to an *Arithmetical, Identical* or *Pythagorical* Proportion; that is to say by taking *Eye for Eye* in a literal sense, which *Aristotle* says the *Pythagoreans* maintained; but its sufficient for satisfying the Law of *natural equity*, that the punishment be executed according to a proportion *Geometrical, Analogical, or Aristotical*; that is to say, by paying of an equivalent, according to time, place, person, and other Circumstances attending the committing of the Crime: This I shall prove by several Arguments, *viz.*

115 *Argum. 1.* From the practice of the *Jews*, who may be admitted to clear the sense of a Political Law of their State, because they were the first Receivers of it; and they neither did, nor in all cases of Bodily Injuries could, observe any other but *Geometrical Proportion*; For, as it appears by the Particulars following,

115 1. In many Cases it was impossible to take *Retaliation*; as in the Example, *Exod. 21. 22.* of a Woman who by a Hurt given to her by mens striving together, makes an Abortion, or parts with an inanimat Child; the man could not be punished by a *Pythagorical Retaliation*, but a Sum of Money succeeded in place of Punishment, by the words of the Text. In like manner, there could not be a *Pythagorical Retaliation* in Injuries done to the Body by Rapes and Adulteries; and therefore when *Sampsons* Father in Law, with concurrence of the *Philistines*, took his Wife from him and gave her to his Companion: *Sampson* did not take their Wives and bestow them upon others, according to the literal sense of the Law of *Retaliation*; but he, as a Judge and Ruler in *Israel*, having power to take Revenge for Injuries done to the Person and Honour of his Wife, compensated them by burning of their Corn, with their Vineyards and Olives, &c. *Judg. 15. 5.* Yet nevertheless, he excuses his taking revenge, in words declaring it to be *Retaliation*, saying, *vers. 11. AS they did unto me, SO have I done unto them.*

117 2. The Law of *Retaliation* did not hinder the *Jews* to transact for the Injuries done to their Persons except Death was the Consequence of the Injury, and this is inferred from Gods prohibiting Transactions simply in the case of *Homicide*, *Numb. 33. 31. ye shall take no ransom for the life of a Murderer*: So *Ainsworth* on *Exod. 21. 25.* infers. [*Josephus Antiqu. lib. 4. cap. 46.* gives the Election to the Pursuer whether he will have the Fine or the reciprocal Punishment: but *Ainsworth*, a man well versed in Rabbinical learning, observes no such thing out of *Maimonides*, whom he adduces to prove their custom of transacting.] And this serves to vindicate the practice of the Justice Court, where such transactions are judicially allowed, as we shew among the Defences, *N. 74. 77. 78, 79. supra.* which prove that these kind of Injuries are but *privata delicta*, wherein the Publick is not concerned.

118 3. For the same Reason, (*viz.* That *Paction* or *Transaction* was allowed to the *Jews*, *tanquam in delictis privatis*) their Judges never did, nor were they obliged to enquire in these Crimes. And this is inferred from *Deut. 19. 17, 18.* where it's said, *That both the men between whom the controversie is shall stand before the Lord, before the Priests and the Judges which shall be in these days*; and then, but not till then, it's said, *the Judges shall make diligent inquisition.* This is another of *Ainsworths* Observations; and it agrees with the Civil Law, and our practice mentioned, *diſt. N. 79. supra.*

119 4. If the Party injured did apply to the Judge, and insisted to have the Pain of *Retaliation* inflicted, yet even in that Case the Judge was not always oblig'd

to inflict it according to the words of the Law, but was to enquire into the circumstances of time, persons, place, age of the Delinquent, as also his strength to undergo the Punishment, without the loss of his Life; for a sickly man, by the loss of his Hand, might lose his Life; likewise, the taking away the Eye of a *Monoculus*, or the Hand of a Delinquent, who had but one, would be harder to him, than what he had done to one having two Eyes or two Hands; the Judge was also to consider, whether he was pursuing or defending when the Crime was committed; and according to these and other Circumstances he was to punish or not punish, & to lighten or lessen the Punishment as he should think fit, *ex. gr.* though the Rule of *Retaliation* foresaid in *Hurts*, be only simple *Retaliation*; *Stripe* for *Stripe*, yet the single smiting of Father or Mother was punished with Death, *Exod.* 21. 15. And on the other Hand; if a Master smite out the Eye or Tooth of his *Man-servant* or *Maid-servant*, the Master was not punished with pulling out of his Eye or Tooth, but the *Servant* obtain'd his Liberty, as a thing more profitable for him, *Exod.* 21. 26, 27. Also, if a *Magistrat* do smite a *Beggar*, it's not to be punished as a *Beggar's* smiting a *Magistrat* with Amputation of a Hand, or some greater Punishment; [As to which Cases, read *Cajetan* and *Willet* their Commentaries on *Exod.* 21. 24, 25, 26.] All which being considered, it could not be easie to fix upon a Case wherein simple *Retaliation* could be exactly inflicted by the *Jewish* Magistrats in a *literal sense*. All this agreeth to the Practice of other Nations, and if we were not here restricted to speak of Personal Injuries done to the Body, we could give many instances in the *Jewish Law*, wherein *Pythagorical Retaliation* was not observed, particularly in *Theft*, *Exod.* 21. 1, 5. where the *Thief* was to restore, somerimes the double, sometimes four-fold, and sometimes five-fold.

5. When the Pursuer and Defender among the *Jews* were persons of equal Quality, and otherwise equally Circumstantiated, and the case it self plain and free from aggravating Circumstances; (which is the only difficult Case, and seems to be the very Case that *Josephus* speaks of, as is mentioned N. 117. *supra*.) Even then, if the Pursuer insisted for Corporal Punishment, according to the letter of the Law; the Judge had Power to determine a Pecunial Recompence, which the Party injured was obliged to accept of; and the Delinquent who pay'd it was thereby freed from the Corporal Punishment. This Pecuniary Mulct was modified on five accounts, according to *Rabbi Cana* cited by *Paulus Voet*. §. 7. *inst. de injur.* of whose Doctrine he sets down a short abstract. As also according to *Rabbi Moses Maimonides* in his Treatise of *Hurts*, whereof *Ainsworth* in his Commentary on *Levit.* 24. 19, 20, 21. sets down a larger abstract. The Damage (says he) was modified: 1. For the lost Member. 2. For the lost Labour. 3. For the Pain and Trouble which the injured Party suffered by the Wound. 4. For the Expenses of the Cure. 5. For the mark of Ignominy and Deformation; where also he shews to what Sum the quantity of each Mulct extended; but neither *Voet*. nor *Ainsworth* speak of Corporal Punishment in their Abstracts. These things are written by the *Rabbies*, who best understood the custom of their own Nation, and had no interest to pervert the truth in matters of that concern. And this may serve for a sufficient proof to justify the common Opinion, *viz.* that GOD did not intend the Law of *Retaliation* should be literally executed; and that the *Rabbies* thought this manner of execution inconsistent with the Rules of distributive Justice, & that the observing the Rules of distributive Justice, satisfied the natural Equity of the Law. *Ne* (says *Vander Muelen dict. qu. 15. vers. fin.*) *scuticâ dignum horribili flagello scetetur; aut securis meritum scuticâ solveere cedamus*: And therefore

Pool, and other Divines on *Exod.* 21. 24. conclude, that this Law of *Retaliation* was only *Minatory*. But of this we shall have occasion to say more hereafter, when we come to our last *Argument*, taken from the Opinion of Divines in this Case. Mean time, we may take notice, that *Rabbi Moses Maimonides* in his Treatise of *Hurts*, cap. 1. sect. 3, 4. (as he is cited by *Ainsworth* on *Exod.* 21. 25.) ascribes the Opinion of *literal* and *strict Retaliation*, to the *Sadducees*, who affecting a strictness in execution of Laws, did therefore superciliously assume the magnifick Title of *TZADDIKIM*, or *JUST MEN*. *Hospin. de Orig. Monach. lib. 1. cap. 4.* as if they (forsooth) were the only just and righteous men of their Nation: And they have not wanted Successors in Ambition, in almost every Age, who being guilty of gross Opinions (as the *Sadducees* were,) by Denying the Immortality of the Soul, and the Existence of Spirits, &c. have endeavoured to support their Reputation by their assuming some proud Title or another.

- 121 6. If the Pursuit was against a false Witnes, (who by his false Testimony had taken away the life of an innocent man) as *Deut.* 19. then the Punishment was certainly inflicted according to the precise letter of the Law, because he was guilty of *Homicide*; but then the doubt yet remains, as to the loss of a Member, whether or not the false Witnes was to suffer *Retaliation* in a literal sense, and the ground of the doubt is from the words of the Text, *verses* 19, & 20. which command, that it should be *done unto him as he thought to have done unto his brother*: and that upon a Moral Reason, *that evil might be removed from the people, and these which remain'd might hear and fear, and commit no more such evil*: which refers to a custom the Jews had of publishing their Criminal Sentences in every City; Further, it's there said to the Judge, *verse* 21. *Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot*; and yet even in this Case, *Paulus Fagius* on the same Text of *Deut.* 19. says, *Hec lex talionis, autore Rabbi Kana ut à Becah citatur, nunquam observatur, nam præter scripturam ex traditione ait constari quod non oculus pro oculo sed æstimatio pecuniaria reddatur.* And *Ainsworth* on *Exod.* 21. 25. cites *Maimonides* his Treatise of *Hurts*, Chap. 1. Sect. 3, 4. to prove that the words *thine eye shall not pity*, relate only to the Case where Satisfaction was not made at the sight of the Judge; but yet if the life was taken away by the Testimony of the false Witnes, then his life behoved to go, and he could expect no mercy, because he was like the man who lay in wait to kill his neighbour, and *came presumptuously upon him to slay him with guile*: and concerning such a man, GOD's express command is, *Thou shalt take him from mine Altar, that he may die*, *Exod.* 21. 14. And this may serve for proving the first *Argument*, taken from the Practice of the Jews.

- 122 Arg. 2. The second *Argument* to prove that the Law of GOD did not require *Retaliation* in a literal sense, arises from comparing that Law with the Laws and Writings of the *Grecians* and *Romans* on that Subject.

1. I begin with their Law of *Retaliation*, as it is in the seventh of the XII. Tables, *tit. de injur. cap. 4. l. 2, 4, 5.* and the last words of the sixth Law, with the Paraphrase of *Jacobus Gothofredus* thereon, who collected these Laws from *Ant. Gellius*, and other *Roman* Authors, and this should bear the greater weight, in that the *Grecians* who are said to receive them from the *Jews*, and the *Romans* who received them from the *Grecians*, had no interest to corrupt or alter this Law, or to distort it to a wrong sense, nor were tempted with the blind Zeal that misled them in Religious Worship. And so we have just reason to believe, that this Law, as it is in the XII Tables, is worded according to the true meaning of the Law of GOD, from which it was taken, as we said *N. 105. supra*, and may serve to illustrate the same.

Follow the words of the Text, with the foresaid Paraphrase, and the Scriptures in the Margin which correspond therewith.

	Text.	Paraphrase.
The Examples after adduced, shew this was smiting on the Mouth.	1. 2. <i>de injuriis levioribus.</i> SI QUINJURIAM ALTERI FAXIT XXV. ÆRIS POENÆ SUNTO.	<i>Si quis injuriam levio- riorem, sive re, sive verbis, alteri fecerit, 25. assibus multator.</i>
Exod. 21. 24. Hand for Hand, Foot for Foot.	1. 4. <i>de pena talionis.</i> SI MEMBRUM RUPSIT NI CUM EO PAICIT TA- LIO ESTO.	<i>Si quis alteri mem- brum aliquod ruperit, ni cum eo pacisci ve- lit, membrum ei pa- riter rumpere injuriâ affecto jus esto.</i>
Ibid. Tooth for Tooth.	1. 5. <i>de offe fuso, i.e. den- tibus excussis.</i> QUI OS EX GENETALI FUDIT LIBERO CCC. SER- VO CL. ÆRIS POENÆ SUNTO.	<i>Qui dentem ex gingiva excusserit libero homi- ni trecentis Assibus multator, qui servo 150.</i>
Deut. 19. 19, 21. Thou shalt do unto him as he thought to have done unto his bro- ther, and thine eye shall not pity, but life shall go for life.	1. 6. <i>de falso.</i> SI FALSUM TESTIMO- NIUM DICASIT, SAXO DEICITUR.	<i>Si quis falsum testi- monium dixerit saxo Tarpeio preceps de jeci- tor.</i>

Now let us compare these Laws as Paraphrased, one by one, with what we have said N. 115. & seqq. concerning the Doctrine of the Jewish Rabbies, and we shall find an exact agreement betwixt the Rabbies and these Laws. For,

1. As the Rabbies acknowledge N. 117. *supra*, that the Jews might *Transact*; 123 so the same is evident from the said l. 4. *de pœna talionis*, and these words thereof, NI CUM EO PAICIT, or as the Gloss has it, *pacisci velit*, that either a *Transacti*on actually made by the Delinquent, or his being willing to *Transact*, as the Paraphrase has it, was sufficient to liberate him from the Corporal Punishment of the Law.

2. It appears from l. 2. *de injur. leviorib.* such as *depalmation* or smiting on 124 the Mouth; that this was not recompens'd by *depalmation*, but by payment of a Pecunial Sum, viz. xxv. *asses*. And this is that Law which *Phavorinus* apud A. Gell. loc. citat. objects to *S. Cecilius*, telling him how the insolent and wicked *Lucius Veracius* (or as others read *Neracius*) baffled the Law, taking advantage from the smallness of the Penalty, to smite every man he met with on the Mouth, and thereafter to cause his Slave that followed him with a Bag of Money, to pay down the Ransom.

3. It appears by l. 5. *de offe fuso vel dentibus excussis* that the Law of GOD. 125 *Tooth for Tooth*, was not followed in the *Literal* and *Pythagorical* Sense, nor

could the Judge discern it in that Sense, because the Law limits him *ad penam CCC. assium*; if the Party injured was a free man, and to the half it, if he were a Slave, and this difference shows, that the difference of persons was observed.

116 4. And last of all, as the false Witnes was punished by the Law *Dent. 19.* with Death, if by his false Testimony he had taken away the life of a man; so by the last of the Laws of these Tables, he was thrown over a Rock without Mercy. And even the later Law of the Romans, (although it has in many things derogated from the Law of the XII. Tables, according to *Ulpian. l. 1. ff. ad C. Aquil.*) yet it contains the Law of Retaliation against a false Witnes, *Qui falsum testimonium dolo malo dixerit quo quis publico judicio rei capitalis damnaretur, l. 1. §. 2. ff. de Sicar.* which upon the same Reason was against false Accusers, both by the Civil Law, in *l. fin. C. de accusat. authen. sed novo jure. C. de adult.* and by the Canon Law, in *Caus. 2. q. 3. c. 2, & 3.* the words are, *Calumnator si in accusatione defecerit, talionem recipiat, qui non probaverit quod objecit pœnam quam intulerit ipse patiatur*; though *Clarus lib. 5. §. fin. q. 81.* proves, that this (as to Accusers) is abolished, *Ferd. Vasq. l. 2. controvers. cap. 18. N. 6.* wishes that the Pain of Retaliation might be punctually exacted from both Witnesses and Accusers, that Pleas might have an end. So that in this point of punishing a false Witnes, the Jewish Law was not more strict than the Roman Law is.

127 2. As the words of the foresaid Law [*SI MEMBRUM RUPSIT NI CUM EO PAICIT TALIO ESTO*] according to *Gothofreds* Paraphrase, did admit of a Ransom, in place of strict Retaliation, when the Delinquent was willing to pay the same; so the Greek and Latine Authors, who liv'd at the time when this Law was in vigour, understood it in the same sense, as appears by the Reasonings of *Aristotle*, (a famous Professor of Philosophy in Athens, the chief Seat of the Grecian Learning,) against the *Pythagoreans*, *Arist. lib. 3. Ethic. cap. 5.* renewed by *Phavorinus* a Roman Philosopher, against *S. Cecilius* a Lawyer, *vid. Aul. Gell. lib. 20. cap. 1.* and summ'd up by *Matthæus, dict. tit. de injur. N. 2.* from which we argue thus,

128 First, It must be granted (without considering the strength of their Arguments) that if they believ'd that strict Retaliation was impracticable in the matter of Bruises and Wounds, then the Law could not in their Opinion require a strict Retaliation in these Delicts, but this they believ'd; as is clear from the first Argument of *Phavorinus*, in these words, *If (says he, imitating Aristotle) a man, through chance or inadvertency, mutilat or maim a member of another mans Body, it will be impossible for the party lesed to take a casual or inadvertent Retaliation; yea, though the Injury be done designedly; it will be difficult (if not impossible) to make a Wound so equal to another, as it shall neither be deeper nor broader, and the Judge will not be able to observe such precise measures as shall equally ballance and not exceed the Injury given. Moreover, if both parties should haply be in the wrong, and multiply Injuries to one another, and those of a different nature; it would be an unaccountable cruelty to raise a Suit for obtaining all these things to be done by way of Satisfaction and Retaliation, for so, infinite Reciprocations and Retaliations would follow to both parties.*

129 To these Arguments *S. Cecilius* makes answer (my dear *Phavorinus* says he) although one Member cannot be broken or bruised to the exact dimensions of the wound and bruise of another, yet Retaliation should not therefore seem unjust; for why? we should not require the same measure or nice ballancing, of the stroke upon the same Member, with respect to all circumstances and accidents, for that cannot be done; but we should rather consider the intention of the Percussors mind,

mind, and if he acted of design, or by sudden passion; and seeing the Law permits Transaction to be made, and a Ransom to be payed, if in that case the Percussor will not redeem the Punishment, by payment of the Ransom, the Decemviri, Authors of the Law, allowed Retaliation to be exacted, whether the Delinquency was done by design, or by inadvertency; for what Cruelty, I pray you, can there be, if the same be done to you which you did to another, especially when you were allowed to transact and pay a Ransom, and no necessity lay upon you to undergo Retaliation, unless you your self had choos'd the same? And now, can any of the Edicts emitted by the Prætors, concerning the estimating of Injuries, be more just or approvable? Also, I would not have you ignorant, that the Judge necessarily behoved to reduce this Retaliation to an Estimat. For if the Delinquent, refused to undergo the Retaliation ordered by the Judge, then the Judge condemned him to pay a Sum of Money, as the Estimat of the Plea. Whereby if the Delinquent conceiv'd that the terms of Agreement, & the Punishment of Retaliation were both too hard; the Severity of the Law was taken off by the payment of a Pecuniary Mulct.

And now seeing Phavorinus, whom S. Cæcilius honours with the Title of one vers'd in the Learning of the Academicks, thinks it was impossible to execute this Law by Identical or Pythagorical proportion: and that S. Cæcilius himself yields to an Analogical proportion, as agreeable to the Law and Custom of the Romans; how can we think that this Law had any footing in the strict Sense, among the Romans, whose mind these Disputants their Countrymen, are presum'd to have understood? But

2. As the Dispute betwixt these two Romans, shews what was the Opinion of that People at that time, even so the Arguments which Aristotle urg'd long before against Pythagorical Retaliation, shew that the learned Athenians (from whom the Romans receiv'd that Law) had always understood, & maintain'd it, according to the Rules of Distributive Justice, or Analogical Proportion. "Distributive Justice, says he, requires of Judges that they seriously consider the Circumstances of Fact, the Persons by whom and against whom the Crimes are committed. For if a Peasant should beat a Magistrat, or a Child his Father, or a Slave his Patron, certainly the Crime would deserve greater Punishment than if committed by the Magistrat against the Peasant, the Parent against the Child, or by the Patron against his Slave: and yet according to the Law of Pythagorical Retaliation, he must be equally punished who offers a Blow to a Prince, and to a Begger: And a Slave offering Violence to his Patron, and a Patron injuring his Slave, must suffer the same degree of Punishment; which to every man seems absurd: And on the same ground, if ye smite out the Eye of a Monoculus, you shall lose but one Eye by way of Punishment, whereas if the Monoculus smite out your Eye, he must be made Blind, tho' he made not you Blind: and if you having two hands, smite off the single Hand of your Neighbour, and thereby make him incapable to serve himself in the necessities of Nature, yet you shall lose but one Hand, and be still capable to serve your self with the other. Again, Distributive Justice, as it considers the person, so it diligently ponders Time and Place, and one and the same Crime, is not equally atrocious at all Times, and in all Places, as the Stoicks fancied, but increaseth and diminisheth according to the Time and Place of committing. Whereas if Pythagorical Retaliation hold good, then he who Wounds his Neighbour in presence of the Judge, and he who Wounds him in an obscure Vault, and he who Wounds him in a Church, or Palace of the Prince, and he who Wounds him in a Tavern or a Brothel house; must suffer alike Punishment. Moreover, if strict Retaliation take place, then if Claudius Pompeius commit Adultery with Cæsars Queen, Cæsar may retaliate by committing Adultery with the Wife of

"*Claudius*, which is contrary to the rules of Morality; and if *Caesar* steal 1000 weight of Gold from the Thesaurry of the People, they may retaliate by robbing the Coffers of *Caesar*; and if *Albinus* reproach *Modius*, *Modius* may in Retaliation revile *Albinus*, which were to be guilty of a sinful sort of Retaliation, and may take place according to *Pythagorean* Doctrine, not only in Adultery, Theft, and Reviling; but in Witchcraft, Sacrilege, Incest, violation of Sepulchres, Calumny, Prevarication, supposititious Births, and all manner of Villanies; whereas all these Inconveniencies may be shunn'd, by observing the rules of *Distributive Justice*.

132 And now having given an account of these Debates, to prove matter of Fact, to wit, that the *Grecians* and *Romans* did believe and practise the Law of Retaliation, in an analogical sense, at the times when these Debates were managed; I shall now subjoyn some Considerations for preferring the Authority of *Aristotle*, before that of *Pythagoras* and his followers: As, First, The Question was about the sense of a political Law; which *Aristotle* is to be presum'd to have understood better than *Pythagoras*, because he learn'd the knowledge of Law from *Plato* his Master, who wrote *de legibus*; and *Menochius* *proem. de Arbitr. N. 3.* calls him the learnedst of *Plato's* Disciples. 2. *Aristotle* being a Professor of Philosophy, and a constant Residenter at *Athens*, and having written well on the Politicks, its presum'd he understood the Laws & Customs of *Athens*, better than *Pythagoras* did who resided long among the *Egyptians* with *Amasis* their King. 3. Its probable that *Pythagoras* learn'd the first Principles of strict Retaliation from the *Egyptians*, where he also learn'd the foolish Opinions of the *Metempsychosis* or Transmigration of the Souls of Men into Beasts and Plants, and the idolatrous Doctrine of worshipping the Sun and Moon. 4. *Pythagoras* seems to have had little Authority among the *Grecians*, because he was mocked by divers of them. *Timon* in his *Silli* reproaches him for his Magical Arts, and hunting after the Praise of Men, without merit. *Xenophanes* *Cratinus* derides him in his *Pythagorazusa*, and *Alexis* in his *Tarentines*, for his ridiculous Conclusions and scholastick Toys; and could there be a more ridiculous Fancy, than his adoring of Beans to that Degree of Superstition, that he choos'd rather to be kill'd than make his escape, by trampling on them when pursu'd: more of his Follies may be found in his Life written by *Diog. Laertius*. 5. His absurd Doctrine of Communication of Goods, need'd strict Retaliation to defend it against the Janglings which such a Doctrine would produce; and his affecting the Name of a strict Justiciar, might be another cause to defend strict Retaliation. Lastly, the learned *Rivetius*, *Wallaus*, *Matthaus*, and many other Divines and Lawyers, prefer the Arguments of *Aristotle* and *S. Caelius*, before these of *Pythagoras* and *Phavorinus*.

133 It's true indeed, that *Bodinus* lib. 6. *de repub. cap. ult.* takes a way of his own, and censures both *Aristotle* and *Phavorinus*, as if they had mistaken the meaning of *Pythagoras*; and for this *Bodinus* himself is as severely censured by *Matthaus* *dict. c. 4. N. 3. in fin.* But, for all this, he acknowledges that strict Retaliation was never practis'd in the Cities of the *Jews*, and cites *Maimonides*, and the words of *Rabbi Kana* to prove it:

134 The only thing which seems to gravel *Bodinus*, (and which, as *Matthaus* observes, is neither cleared by *Aristotle* nor *Phavorinus*) is whether strict Retaliation was in use where the Offender and Offended were in equal Circumstances; as for example, a Peasant demembring a Peasant in a privat place, &c. but this is no difficulty, and *Aristotle's* Arguments drawn from Circumstances, are still pungent against identical Retaliation, upon this ground, that if the Law had required it in cases of equal Circumstances, it would have distinguished betwixt a simple and circumstantiated Case, and would not have determined the

the same Punishment in the general, which could be neither just nor possible in all cases.

We cannot deny but some of the Oriental Nations, and particularly the *Locrians* did exact *strict Retaliation* for the *Eye*, and we have a remarkable Case in *Diod. Siculus lib. 12*, which happened to be pleaded upon the Law of *Charondas*. *Si quis cui oculum eruerit, oculum reo pariter cruito*. A *Monoculus* had his Eye smitten out, the *Delinquent* had one of his Eyes taken out by way of *Recompense*, but the *Monoculus* thinking that Punishment not sufficient, brought the Case before the *Assembly of the People*, and demanded the other Eye also; the *Delinquent* alledged, that he had satisfied the Law by the loss of one of his Eyes; the *Plaintiff* replied that the *Delinquent* ought to be made blind since he had made him blind, and because the Law did not ordain it, he crav'd the Law might be rescinded, and another made more strict: and, according to the Custom of the Place, came with a Rope about his Neck ready to undergo the punishment of being hanged therewith, in case his Desire should be rejected, and so far prevail'd that the former Law was corrected. This account is also given by *Plato*. But though all this be true, yet it proves not a general practice of *strict Retaliation* in all cases; for, if that had been, then the Law would not have run singly as to the Eye, but in general Terms. Moreover, the Prohibition (which *Aerodius* mentions) holds forth, that the Law was made with a singular respect to the Eye, for its excellency and usefulness to the Body beyond other Members; and for this cause 'twas that *Justinian* reckons the percussion of the Eye among atrocious Injuries §. 9. *Inst. de injur.* and *Charondas* did no more than *Christians*, who condemn *strict Retaliation*, have done: we have a proof in the words of *St. Augustine Epist. 159. ad Marcellin.* (cited by *Gratian Caus. 23. q. 5. C. circumcelliones. 2.*) where he relates that he himself interceded with *Marcellinus*, that the *Donatists*, who were arraigned before him to be punish'd for whipping a Catholic Priest, and putting out one of his Eyes, and cutting off one of his Fingers, might not be punish'd by *strict Retaliation*: and thence it seems that *strict Retaliation*, for such atrocious Facts, was in use in his time. The same is prov'd by *Novel. 92. of Leo the Emperour*: and by the Decision of *Charles the fourth against Zachora*; cited N. 24. *supra*, and by *Novel 142. of Justinian* ordaining *Castration* to be punish'd with *Castration*.

And this may suffice for our second Argument taken from comparing the Law of GOD, with the Laws and Writings of the *Grecians* and *Romans*, on the Subject of *strict Retaliation*; to prove the Conclusion formerly laid down, that although Retaliation in the general be founded on natural Equity, yet its still to be understood as admitting of satisfaction by *analogical* and *geometrical* proportion.

Argument 3. To prove the same Conclusion, shall be taken from the Authority of Divines and Lawyers. I begin with *Grotius*, because eminent in the knowledge of the Jewish and Christian Theology, and the political Laws of both: this learn'd Author *lib. 2. de jure B. & P. Cap. 20. N. 1.* having acknowledged the natural Equity of the Law of *Retaliation* in these words; *Among these things which natural Instinct tells us are lawful and not unjust, this is one; ut malum qui facit, malum ferat, that he that doth evil should suffer evil: which Philosophers do reckon as the most ancient and most perfect rule of Justice, or as one of the Laws of Rhadamanthus, yea so ancient and indubitable, that Plato was so bold as to say, that neither the Gods nor Good-men durst never say otherwise, but that he that doth wrong deserves to suffer for it.* He after all this, N. 10. speaking of the same Law of *Retaliation*, and how far *Christ's* words *Matth. 5. 44. you have heard it said an Eye for an Eye, &c.* make an alter-

ration of it; and having also insisted upon some passages concerning it, taken from St. Augustine on Pal. 108. and Tertullian, he thus concludes: *By this of Tertullian we may see that its not only unlawful for a Christian to exact this Law of Retaliation, but that it was not tolerated among the Hebrews, as a thing simply and in it self commendable; but only for the prevention of a greater Evil.* Thus also doth S. Chrysostome on Ephes. 4. 13. expound that Law of Retaliation, Therefore doth Christ urge that Law of Moses an Eye for an Eye, and a Tooth for a Tooth, *ut illius manus cohibeat, non ut tuas excitet contra,* to restrain him that offers the wrong, not to provoke thee to revenge who sufferest it; not only to preserve thine Eye, but to keep his also safe. And again, *The most learned among the Hebrews did not apprehend it in that latitude; for they respected not so much the words of the Law, as the Reason of it, and the intent of the Lawgiver.* And at some distance says, *For even the Jews themselves (as Josephus tells us) besides the Costs and Charges of the hurt done, whereof we have a distinct Law Exod. 21. 19. did usually buy off their Talio with a Sum of Money. The like they did at Rome, as Favorinus in Gellius testifies.* In these last words he makes the Parallel betwixt the practice of the Jews and Romans; and we have shown that the Romans did never exact strict Retaliation, unless in atrocious Cases. St. Aug. l. 19. c. 25. *contra Faust. Manich.* calls the Law of Retaliation, *non fomes sed limes furoris,* to shew that it was not design'd for exacting strict Retaliation, but to restrain the Jews from privat Revenge, by which they were in use to redress themselves before the Law was made. And Grot. dic. c. 20. §. 8. *in fin.* relating to the after Custom, says, *The Hebrew Law permitted the Kinsman of him that was murdered, to kill the Murderer with his own Hand, in case he overtook him without the Cities of Refuge. And it is well observed by the Hebrew Doctors, that a Kinsman might exact the Law of Retaliation with his own hand for the person killed; but for himself, if any violence was offered him either by Wounds, Mutilation, or otherwise, he was to make his Appeal to the Judges; because it is a very difficult thing to moderat our Passions, when they are excited by our own personal Grief.*

¹³⁷ Goodwyn, famous also for his Knowledge in the Jewish and Roman Antiquities: in his *Moses and Aaron lib. 5. cap. 8.* says, that the Hebrews understood not *talionem identitatis, vel Pythagoricam, but similitudinis, vel analogicam,* which was when the price of an Eye or some proportionable Mult was payed; & that it's impossible to punish one Maime with another: And for this he cites *Targum Jonath. on Deut. 19. 21.* And *R. Sol. ibid.* Further he cites Munster on *Exod. 21:* affirming that the Hebrew Doctors say, that the Party offending was bound to a five-fold Satisfaction. 1. For the Hurt in the loss of the Members. 2. For the Damage in loss of his Labour. 3. For his Pain or Grief arising from the Wound. 4. For the Charge in curing of it. 5. For the Blemish or Deformity thereby occasioned, [and this agrees with what was formerly cited out of Maimonides by Ainsworth, N. 120. *supra.*] And says, that Munster rendereth these Five thus; *Dammum, Sessio, Dolor, Medicina, Confusio.*

¹³⁸ And the Testimony of the Jews hath the more weight in that they were most tenacious of their political Laws, & strict in the literal observing of them, particularly of that *Deut. 21. 2.* concerning one found slain in the field, as Ainsworth out of Maimonides in his Treatise of Murder, *cap. 9. sect. 4. 9, 10.* & Selden de *Syned. lib. 3. c. 7.* relate; And surely they would have been as strict in the execution of the Law of Retaliation, had they not certainly known that an analogical executing thereof was sufficient, & that it was made *magis ad terrorem quam damnationem,* and to hinder the Party injured from taking Revenge. *Isod. Pelusiot. lib. 4. Epist. 96.* cited by Rivetus on *Exod. 21: 24:* speaking of Eye for Eye, says, *quod lege hac cautum est, nec est crudele neq; immane; sed siquidem is sensus qui prima fronte accipitur iustitia plenum est; si vero interior sensus expendatur etiam humanitate referuntur est, nam ut cum qui alteri quid inique facere*

cere meditatur, compescat metu similis perpeffionis, & ita improbitatem reprimat, ideoq; hæc jure meritoq; ita sancivit. The end and design of their Law being, *non ut libidini populi indulgeretur, sed ut qui ad injuriam inferendam proni e-* rant, talionis metu, coercerentur. As Rives expresseth it on Exod. 21. 24, 25.

Further Godwyn says from *A. Gellius. lib. 20. c. 1.* that the Romans likewise ¹³⁹ had a Talio in their Law, but they also gave liberty to the Offender, to make choice whether he would, by way of Commutation pay a proportionable Mult, or in identity suffer the like Maim in his Body. And here we may observe that he takes the Testimony of *S. Cæcilius*, as a proof of the custom of the Romans, as the other DD. who cite that Dispute, do.

Paulus Fagius on Deut. 19. sayes, Hæc lex talionis antequam Rabbi Kanan, ut a ¹⁴⁰ *Bachi citatur, nunquam est observata. Nam præter scripturam, ex traditione ait constare, quod non oculus pro oculo, sed æstimatio pecuniaria addatur alio-* quin enim legi non satisfaceret, quæ ait, quemadmodum dedit maculam in hominem, sic detur in autorem, *Levit. 14. jam patet, Exod 21. quod de interesse & sumptu in medicos factò, satisfacere læso, qui damnum dedit, tenetur. Quod si auctori oculus pro oculo effoderetur, quis illi satisfaceret? Est & alius tenerioris Constitutionis quàm qui læsus est, qui ex equali vulnere similiter mortem biberit. Propterea fieri non potest, ut per omnia vulnus & læso aequalis auctori infligatur.*

The Reader may also peruse these Divines following, viz. *Episcop. inst. l.* ¹⁴¹ *3. sect. 2.* and Pool in his Critiques following him: as also Pools annotat. on *Exod. 21. 24.* See also Simlerus, Willet, Cajetan, a Lapide, Clytiæus and Rive- tus, on *Exod 21. 24.* Lorinus (most amply) in *Levit. 25. 19. 20.* Maldonat in *Math. 5. 38. 39.* Ant. Wallens, oper. tom. 2. p. 290. Col. 2. all absolutely condemning Pythagorical Retaliation. And if we turn over all the Divines, whether Ancient or Modern, Reformed or Romanist, in their Commentaries and other Writings, we'll find all, few or none excepted, agreeing to an ana- logical Retaliation, and affirming that the exacting of strict and literal Retaliation, was never intended by the Law of *Mos-s.* And the most that some Di- vines grant, is that identical Retaliation may becrav'd in a Libel, thereby to force the Delinquent to a Transaction.

To conclude this Argument taken from the Authority of Divines: As the Sad- ¹⁴² dukes, did parronise identical Retaliation, among the Jews, & were none of the foundest of their Sects; even so the Manichees were it's Patrons under Christia- nity, (as may be seen by *S. Augustine* in his Disputes contra Faustum. l. 9. c. 25. and *Adimantum* Manichæos; and by *Isid. Pelusiot. Epist. l. 2. Epist. 133.*) of whom it hath no Reason to glory, for these Manichees were the most wicked of all Hereticks in the Church, and are classed by *Theodosius* the Emperor, l. 5. c. de Heret. in the Rere of a black Tribe of the worst of them, with this Stig- ma; *Manichæi qui adimantumq; scelerum nequitiam pervenerunt*, and for that cause he commanded them to be banished out of all Cities, and some to be pu- nished with death.

As strict Retaliation is condemned by the Divines, so also by the generality ¹⁴³ of Lawyers: viz. *Hottoman, Vultæus, Harprecht, Bachovius, Vinnius, P. Voet*; and several others: in their Commentars on these Words of §. 7. *inst. de injur. pena autem injuriarum ex l. XII. Tab. propter membrum quidem ruptum talio erat*; all of them agreeing to the Sense put upon the Law by *S. Cæcilius*, and to *Aristotles* Ar- guments against *Pythagoras*. To these add *Mynfinger* on that Text, who says expressly, that that learned Disput betwixt *Phavorinus* & *S. Cæcilius*, hath brought much light to this matter, because it shews that the Delinquent was lying under no necessity to undergo strict Retaliation, in that he had the power to redeem; And *Gudelinus de jure Noviss. lib. 5. l. Cap. 15. n. 14.* asserts that the Law was im- practicable, if taken in a strict Sense; being convinced by the Arguments

of S. *Cacilius* and *Aristotle*. The like is to be observed from *Jacobus Gothofredus*, in *font. jur. civil. lib. 2. cap. 7. quo commendatio legis XII. Tabb. continetur*; Where having cited *Cicero*, *Tacitus*, *Livius*, *Craſſus*, *Diod. Siculus*; *Dionys. Halicarnassens*, to prove the Equity of the Laws of the XII. *tabb.* he sets down the whole Dispute betwixt *Phavorinus* and S. *Cacilius*, to shew that he embraces the Law of Retaliation no otherwise than as S. *Cacilius* expounds it, and for that Cause his Paraphrase on these words, *Ni cum eo parit*, is *vel pacisci velit*, as we have formerly noted.

And whereas some of these Lawyers, in the places above-cited, say that in the case of Demembration, the Punishment was *Membrum pro Membro*, they are still to be understood as the like words in the Law of GOD, and the XII. *Tab.* that is to say Redeemable, upon a ransom to be modified by the Judge, where the Profer of the Delinquent was too low, or the Demands of the injured Party too high; like the case *Exod. 21. 22.*

144 And all these D D. Divines and Lawyers who have cited that famous Conference betwixt *Phavorinus* and S. *Cacilius*, and founded their Opinion on it, have done so with no less Reason to prove the Custom of the Romans, than they founded on the Testimony of *Aristotle* to prove the Custom of the Grecians. For 1. The Controversy betwixt these *Colloquutors* was concerning the sense of the Law of the XII Tables, which *Phavorinus* (though eminent for Learning) had mistaken and charg'd with Obscurity; and S. *Cacilius* was well vers'd in the Knowledge of them, as you may see by his Answer to *Phavorinus*, in these words *Obscuritates legum non assignari debere culpa scribentium, sed incitiæ assequentium.* 2. S. *Cacilius* was generally vers'd in the Knowledge of Law; as you may see by the Characters he receives from divers persons; *A Gellius* relating that Conference, has these words 3, *in disciplina juris atque legibus Pop. Romani noscendis, interpretandisque scientia, usu, auctoritateque illustris fuit.* *Justinian* calls him *juris antiqui conditor. l. 1. prin. c. de communis servum manumit.* *Papinian* and *Ulpian* approve his Writings; in *l. Titio centum 71. ff. de condit. et demonstr. l. prospexit.* 12. *S. 6. qui et a quibus manum. l. si postulaverit 28. S. si liber 5. ff. ad leg. in l. adulter.* See *Bertrandus* in his Life. Lastly, *A. Gellius* himself who records the Conference, was a learned man and contemporary with these *Colloquutors*, and convers'd with them about the year of Christ 143, which was the year in which *A. Gellius* wrote, as you may see in the Account of his Life written by the Author of the Notes on him in *usum Delphinii*; And in his third Note on that Conference, where he rectifies an Error of Chronology that had crept in to the Text, making that Conference to be many years thereafter.

145 So that by all that is above-said, it appears that the Law of Retaliation was never executed in a Pythagorical or Arithmetical Proportion among either Jews, Grecians or Romans, but according to the geometrical and analogical Proportion; with respect to Circumstances that accompanied the Crime and that the payment of a Ransom for Damages was always admitted: Except the Obstinacy of the Delinquent had given occasion to the contrary; or that there had been a special Law upon a special occasion; or with respect to some particular Member, as the Eye, &c. Which I doubt not, may happen in many Kingdoms, and give occasion to the Variation of Laws. See *Caroli du Fresne, glossarium*, on the word *Talio*. And therefore the Libel of Mutilation 28. July 1647. *Forbes* of *Leslie* against *Menzies* of *Piffaddels*, craving strict Retaliation for the breaking of a Leg, was ill founded; and no doubt if it had come to a Determination, as it did not, the Judges would have refused the desire of it, in respect of the Answer made thereto, setting furth that strict Retaliation was not in practise: And indeed, it's more agreeable

able to Christian Meekness, pressed by our Saviour, *Matth. 5. 39*: To be content with moderat Damages. Concerning which I recommend the Reader to *Grotius de jure B. & P. lib. 2. c. 20. N. 10.* where he particularly treats of what the Gospel requires in this matter: and *N. 36.* he proves, that unless there be urgent Causes to exact the Severity of Laws we should incline to mitigate Punishments; "For herein, says he, consists one part of Clemency, the other consisting in their total Remission.

I come now to answer some Objections which occur to me.

Obj. 1. If strict Retaliation was not enjoy'd among the Jews, then there was no place left for the Exhortation to Christian meekness, or to remitting the Punishment of Eye for Eye, *Mat. 5. 38.* I answer, there was still place for the Exhortation, because the Party injured might always insist for the strict Punishment, but the Judge was not obliged to grant it, except when the Delinquent brought it on himself by refusing to pay the Ransom; and even the Ransom it self might be heavy on some, and so require a total Remission or Mitigation by the Rules of Christian meekness, as we have just now said.

Object. 2. *Ulpian in l. 1. ff. ad leg. Aquil. says, Lex Aquilia OMNIBUS LEGIBUS, quæ ante se de damno injuria loquuntur sunt derogavit; sive XII Tab. sive alia quæ fuit.* By which word *Derogavit*, he means the taking away a part from every one of these Laws, while another part remain'd: for so the word *Derogare* signifies, in opposition to *Abrogare*, or total Rescinding *l. derogatur 120 ff. de verb. signif.* Now you'll ask what part could be taken from the Law, *si membrum rupsit, ni cum eo paucit, talio esto* (which was one of the chief Laws of the XII Tab. *de injuriis*) except strict Retaliation? for analogical Retaliation by paying a Ransom, remained long thereafter; as we see in the Answers of *S. Cæcilius* to *Phavorinus*, who flourished about the year of Christ 143, as we noted before.

I answer, That although *Ulpian* speaks in general, of derogating from all the former Laws, yet he meant only of the plurality; and that way of speaking is very usual, and must be admitted here, or otherways his words will be false. We have Instances in the Collection of the Laws of the XII Tab. made by *Dionysius Gothofredus*, to prove that some of these Laws were not derogated from, but rather strengthened by addition of new Actions; e. g. in *Tit. 10. dist. fragm. Actio noxalis adversus Dominum ex noxia, sive delicto servi*, was propos'd in these words, *Si servus furtum faxit noxiamve nocuit; & Ulpian repeats it in l. 2. § 1. ff. de noxalib.* Now the *Lex Aquilia* introduc'd a new Action *ex eadem causa*, and yet it was still in the Option of the Party injured, to make use of either the old or new Action at his pleasure, because they were not contrary the one to the other; and therefore the one did not derogate from the other, but it was lawful to pursue the Damage upon either of them; *dist. l. 2. §. 1. ff. de noxal. l. Quacunque 56. ff. de oblig. & actionib. l. familia 5. ff. Si familia furt. feciss. § sunt autem 4. Inst. de noxalib.* A second Instance is, in *Tit. 24. §. 8.* of the said Fragments, where there's a Law set down taken from *Plin. 17. l. 1. Fuit & Arborum cura legibus, eantumque est XII Tab. ut qui injuriâ alienas arbores cecidisset, luenat in singulas aris 25.* And there is not a word in the *Lex Aquilia* any ways derogating from it, or from the Action founded on it; but, on the contrary, there is a Text in *l. in duobus. 28. §. Colonus 6. ff. de jure jurand.* allowing this *Colonus* to be pursued, for transgressing that Law; either upon the Law of the XII Tab. or upon the *Lex Aquilia*, or upon the Interdict *quod vi aut clam*; and being pursued to defend himself *per exceptionem juris jurand.* But still it appears that nothing by these new Actions was derogated from the old; and even so the *Lex Aquilia* makes no Derogation from the Law, *Si membrum rupsit*; only it grants

a new Action to a Freeman, as well as to the Master of a Slave, for Damages done to him by wounding; not *Actio directa*, (for that is not competent in this or in any other case *ubi desunt verba legis*, nor doth the Law allow it to a free or ingenuous man, but expressly denies it to him, *Quia non est dominus membrorum suorum, neque ulla liberi corporis aestimatio est, l. liber homo. 13 ff. ad leg. Aquil.*) but *Actio utilis* to recover the Expence of the Cure, Damages for the loss of Time, &c. by the same Reason, that it's allowed to a Father to pursue for the Damages incurr'd, when his Sons Eye is struck out by a Tradesman, to whom he is Apprentice; or by a School-master to whom he is a Scholar, *l. 5 §. ult. Vers. Proponitur, et l. 6. & 7. ff. diſt. Tit.* And it was in the Option of the Pursuer, in this Case, as well as in the two former Instances of the XII *Tabb.* to make use of the *Actio utilis, ex lege Aquilia*; or of the Action that was formerly competent upon the Law of the Table *ſi membrum rupſit*: And we see by the Conference that the first Action was then made use of; or otherways the Objection of *Phavorinus*, and the Answer given by *S. Cacilius* concerning the Prætor's modifying the Ransom in place of strict Retaliation, had been to no purpose.

148 Further, it will appear by the following Accompt of time, that the Actions, *ex Leg XII. Tabb.* & *ex leg. Aquil.* endured for hundreds of years together; after the date of the *Lex Aquilia*: And because the date is uncertain, we must make our best Conjectures about it from the Age of those that cite it, and by comparing it with the Conference betwixt *Phavorinus* and *S. Cacilius*: Now the Conference having been Anno Chr. 143. or thereby, as we shewed N. 144. *supra*; and the *Lex Aquilia* having had a Being in the time of *Brutus* (who cites & decides a Case by it in *l. ſi Servus 27. §. Si mulier ff. ad leg. Aquil.*) which *Brutus* was coæval with *P. Mutius Scaevola*, Father to *Q. Mutius Scaevola*, as may be seen by the words of *Pomponius* commending them, as Founders of the Civil Law about the same time; in *l. 2. §. 39. ff. de orig. jur.* And *P. Mutius* having been Consul with *L. Calphurnius Piso*; anno U. C. 620. as *Dion. Gothofredus in fastis consularibus* asserts, (which in all probability was about the time he cited the *Lex Aquilia*, he having not written till he was of Age;) it follows that the *Lex Aquilia* had endur'd (from the time of this Consulship to the time of the foresaid Conference) 274 years; supposing the Conference was A. Ch. 143. when *A. Gellius* wrote it. 'Twill then follow, that during all these 274 years, the Action which arose *ex leg. XII Tabb. Si membrum rupſit*, endur'd with the *Actio utilis* introduc'd by the *Lex Aquilia*. Another Accompt may be made from the time of *Q. Mutius Scaevola*; (but it will not go so far backward) this *Q. Mutius* likewise cites the *Lex Aquilia*, and decides a case by it *l. 39. ff. ad leg. Aquil.* Now to find out the time wherein *Q. Mutius* liv'd, we must consider that *G. Aquilius* was his ordinary Hearer; for so says *Pomponius, diſt. l. 2. §. 41. 42.* and the time of *G. Aquilius* must be found out by his conjunction with *Cicero*, who in *topicis* calls him his Familiar and Intimate: now *Cicero* (according to *Dion. Gothofredus, in diſt. fast.*) was Consul with *C. Antonius*, anno U. C. 690: And if we should grant with *Vulteius* and *P. Voet.* that *G. Aquilius* was the Author of *Lex Aquilia*; yea, further, which they do not say, that he made it in the year of *Cicero's* Consulship (which is evidently false, being cited by *Brutus* 70 years before) even then, the Interval betwixt this Consulship, and the year of the foresaid Conference, will be 204 years; In all which time both the foresaid Actions continued. And hereby it's evident, that the Law of the XII. *Tabb. Si membrum rupſit*; was none of these Laws which was derogated from by the *Lex Aquilia*; but rather is to be excepted from the general words

of

of Ulpian; *Lex Aquilia omnibus legibus, quæ ante se de damno injuria loquuta sunt, derogavit; sive XII. Tabb. sive alia quæ fuit.* And so the Objection, founded on these general words of Ulpian is fully answered.

This Calculation which I have insisted on, is not obvious to every person, ¹⁴⁹ and may be diverting; withal it may furnish Conjecture that M. Aquilius, Grandfather to G. Aquilius was the Author of the *Lex Aquilia*; because he was before Brutus who cites it, and decides by it. Now M. Aquilius (according to Suarez *ad leg. Aquil. apparat. cap. 1. N. 11*) having been Consul anno. U.C. 625. and before that having been *Tribunus Plebis*; might then have been Author of that Law, which was *Plebisцитum*; *ut in dict. l. 1. ad leg. Aquil.* though with other *plebiscita* it has obtained the Name of a Law *ex lege Hortensia*. But Dion. Gothofredus in *fast. Consul.* makes M. Aquilius to be Consul with C. Marius, A. U. C. 651. which doth not alter the case of his being Author of the Law; because he might have been *Tribunus Plebis*, before the time that Jo. Suarez makes him Consul; I say this only furnishes a Conjecture, for I do not presume to be positive, where the learned Noodt. *ad d. l. 1. Aquil. cap. 1.* And Jo. Suarez (to whom I am beholden for this Calculation) *dict. loc.* plead no further certainty, than that one of the Tribe of the Aquilii was the Author. Further, Suarez thinks it was made *circiter annum U. C. 621.*

Before I enter upon *Arbitrary Punishment*, (which is the true Punishment ¹⁵⁰ of Mutilation and Demembration) I shall according to the Method I propos'd, speak a little to the Question, how far these Crimes may be punished with Amputation of the Hand which gives the stroke? And this falls naturally in here; because if the *Demembration* committed be of an Hand, then the Punishment will be *Retaliation* upon the Matter, though not of Design.

I suppose it will be granted, that, albeit we allow not of cutting off the ¹⁵¹ Hand by way of *Retaliation*, yet, its in the power of the Law-giver to make a Law for punishing certain Crimes, by cutting off the Hand of the Delinquent; There are many instances in the civil Law, as in *l. 3. & Auth. seq. c. de serv. fugit.* A Slave deserting and running over to the Barbarians, is punished in that manner. [where you may observe that the Amputation of the Foot (which was the delinquent Member) contained in *dict. l. 3.* is changed by the Authentick into the cutting off of the Hand] as also in *Novel. 17. cap. 8.* the punishment of Amputation of the Hand, is appointed for the Exactors of Tribute, who express not in their Books, the Quantities receiv'd; the same was the punishment of Writers of Heretical Books, *Novel. 42. c. 1. §. 2. in fin.* and of the Writers of false Instruments, *Gloss in dict. Authent. & Arg. dict. cap. 8.* These two last were the proper Crimes of the Hand, which made the punishment the more agreeable: But withal it deserves our Observation, that this punishment was to be inflicted with much tenderness and previous Consideration; and never to have place against both hands, *dict. Auth.* nor against the useful hand, if the Delinquent had a withered Hand. *Novel. 134. cap. 13. Cabal. Cent. 3. resol. cas. 136. N. 52. & seqq.* The Reason which moved Justinian to this tenderness, may be taken from the *Novel. 134. cap. quia vero* to be this: That a Man mutilated of both hands could not serve himself to the necessities of Life, and therefore Amputation of both hands was never to be inflicted, but when Death was conjoyned as the Merit of the Crime.

The like Punishment is among the later Laws of Saxony and other Nations. ¹⁵² *Carpz. prax. crim. p. 1. qu. 40. N. 40. & seqq. & p. 3. qu. 229. N. 24.* but it is always conjoyned (says he) with Relegation; to prevent Quarrels and other Inconveniencies which might follow upon Peoples shunning the Converse of the Delinquent, as bearing a publick Mark of Infamy on his Body. *dict. qu. 40. 45. & dict. qu. 129. N. 34.* It's frequently used in Aggra-

vation and Augmentation of the punishment of Death, as he relates, *diſ. qu. 128. N. 55. & ſeq.*

¹⁵³ But to leave this uncontroverted Point, and to come to the preſent Queſtion, *viz.* If *Amputation of the hand* be a puniſhment appointed for *Mutilation and Demembration*? we have an Argument for the Affirmative in *Gloſs ad lib. 2. feud. tit. 53. de pace tenenda §. homicidium.* There its ſaid (by the Emperour *Frederick*, the firſt of that Name, according to *Eguin. Baro.*) *Homicidium quoq; & Membrorum deminutio, vel aliud quodlibet delictum, legaliter vindicetur.* Upon which words [*Membrorum deminutio*] the Gloſs in *marg.* ſtates a Queſtion, *Membri amputatio qua pœna puniatur?* And answers, *forte manus delinquentis amputabitur, cum pro ſolo vulnere manus ei amputaretur, ſi pacem violaverit,* and cites for this, § 3. of another Conſtitution of the ſame Emperour *de pace tenenda. tit 47. diſ. lib. feud.* The words whereof are *Si quis alium, intra pacis edictum, vulneraverit, niſi, quod in duello & vitam ſuam defendendo hoc fecerit, probaverit; manus ei amputaretur.*

¹⁵⁴ The Argument of the Gloſs may be form'd in this manner: If *Amputation of the hand* be inflicted for ſingle *Vulneration*, then much more, for *Demembration*, but the firſt holds good and therefore the ſecond. The Conſequence of the Propoſition may be inforced from the Opinion of *Suarez. de cenſuris diſp. 44. ſcſ. 2. N. 4.* where he lays down for a Rule, "That "a Law though containing rigour may be extended from *Mutilation* to *Homicide*, not by reaſon of Similitude in the caſes, or by an Argument drawn "from the leſſer Crime to the greater, but by an Argument drawn from a part "to the whole including that part; and ſubſumes that *Homicide* includes *Mutilation* as a part of it *formaliter vel eminenter*; and juſt ſo *Demembration* or *Mutilation* includes wounding; and therefore the puniſhment of ſingle wounding may by conſequence be extended to be the puniſhment of *Mutilation* or *Demembration*; But the Argument, as its form'd, will only conclude in the caſe where ſimple wounding, is puniſhable, *pœnâ amputationis manus*, by *Fredericks* Conſtitution; and that is only when the wounding is accompanied *cum violatione pacis publicæ*; to which *Gail*, (treating of this and other Conſtitutions of that nature, *lib. 1. de pace publica, cap. 7.*) & *Carpz. diſ. qu. 40. N. 1. 2. 3. 4.* following him, require three Conditions, *viz.* 1. That there be publick Force, and greater than one can reſiſt 2. That the wounding be with Arms; by which *Gail. diſ. cap. N. 2.* underſtands every hurtful Weapon or Inſtrument; as Sword, Spear, Batton or Stones. 3. That there be *dolus verus*, and a formed and deliberated Deſign to hurt. And 'twill be eaſily granted, that ſimple wounding in theſe Circumſtances may be puniſhed with amputation of the Hand, which holds in other Circumſtantiated Caſes, *ex gr. ratione loci*, with reſpect to the place where it's committed. And this is clear from *Carpz. diſ. qu. 40. N. 30, 31, 34, 35, 36, and 37.* where he ſhews that by the Laws and Praſtiſe of *Saxony*, all manner of Hurting, Wounding, or Invading; being committed in the Camp, Caſtle, or Palace of a Prince; or upon a publick way, by one lying in wait, is puniſhable *pœnâ amputationis manus*. And *Baker* in his Chronicle of *England ad annum 1541.* ſhews the ſame to be the praſtiſe of that Kingdom where the Crime is committed within the Verge of the Kings Court. In like manner by the Laws of many Places of *Italy*, a Wound given in the Face, leaving a Cicatrice, is puniſhable by loſs of the Hand *Cabal. diſ. caſ. 134. N. 1.* And *N. 31.* he relates a Deciſion, to this purpoſe, of the *Magna Curia Vicaria*, againſt *Dominicus Feretta* who had wounded a young Boy in the Face; But I remember no Law or Deciſion ordaining ſimple wounding to be puniſhed with *amputation of the Hand*, out of theſe circumſtantiated Caſes: neither is there any thing like it to be found in

in the Law and Practice of this Kingdom; nor in any other case in our Law, except what I mentioned, *N. 9. supra*, where persons adjudged to Death for atrocious Crimes, were sentenced to have a Hand cut off, in aggravation of the Punishment, (as in several other Cases mentioned by *Carpz. diſt. p. 3. q. 128. N. 55. 56. 57. et ſeqq.*) which was inflicted ſometimes immediately before Death, or immediately thereafter, as the Crime deſerv'd.

I find indeed ſeveral Acts of Parliament, (*viz. Act 18. Parl. 1. Act 88. Parl. 6. Act 248. Parl. 15. Act 6. Parl. 16. Ja. 6.*) 'forbidding the uſing of certain offensive Weapons therein mentioned, under the pain of cutting off the Right hand; and the firſt of them proceeds upon a Narrative, that many of the Subjects had been murdered and ſlain; who, if they had not been aſſaulted with ſuch Weapons, might have been able to have defended themſelves; but the laſt of theſe Acts, contains a proviſion, "That if the Action be purſued before the Secret Council, the Delinquent ſhall not incur the Corporal Punishment, but ſhall be puniſhed by Imprisonment, Eſcheat of Goods, or by Fyning, without prejudice of the Execution of the former Acts againſt ſuch as ſhall be purſued before the Kings Juſtices, Which was inſerted as a *Cautela* for preventing the infliction of the corporal Punishment, becauſe it leaves it in the option of the King and his Council to purſue before themſelves; and accordingly all ſuch Purſuits have been brought before them, & not before the Juſtices, that ſo a pecunial Mulct might be inflicted inſtead of corporal puniſhment; becauſe the Council doth not inflict *Penam ſanguinis*; that being proper to the King's Juſtices: By which it's evident that *Amputation* of the hand has been inſerted in theſe Acts, *ad terrorem* only. We have indeed an Ancient Statute in *cap. 2. Statut. Wilhelm.* which ordains him who draws Blood in the Kings Court to have his Hand cut off; But by the later Law, to wit, *Act. 173. Parl. 13. Ja. 6.* "He who ſtrikes or hurts any perſon within the Inner Gate of the Kings Palace where His Majeſty has his Reſidence for the time, "Incurrs the Pain of Treason.

If any man ſhall here object and ſay, may we not according to *Suarez* his Form of Reasoning, argue, that ſeing carrying of unlawful Weapons is puniſhable by our Law with the loſs of the Right hand, though no *Mutilation* or *Demembration* follow on it; ſhould not then *Demembration* be puniſhed with the loſs of the Hand, becauſe it's a greater Crime than ſingle carrying of Arms? I anſwer, that *Suarez* his Argument as it's fram'd, excludes the Conſequence, becauſe it is *argumentum a parte ad totum*, and not from leſſer Crimes to greater, or by reaſon of any Similitude betwixt them. And this may ſerve for *Pæna amputationis manûs*.

I come now in the third place to ſpeak of Arbitrary Punishment, which ſucceeded in the place of Retaliation, as appears by the following Words of *Justinian* §. 7. *Inſt. de Injur. Pæna autem injuriarum ex lege XII Tabularum propter Membrum quidem ruptum talio erat: propter os vero fractum nummaria pæna erant conſtitutæ, quæſi in magna veterum paupertate. Sed poſtea Prætores permittebant ipſis, qui injuriam paſſi ſunt, eam æſtimare: ut judex vel tanti [reum] condemnnet, quanti injuriam paſſus æſtimaverit, vel minoris, prout ei viſum fuerit. Sed Pæna quidem injuria quæ ex lege XII Tabularum introducta eſt, in deſuetudinem abiit: quàm autem Prætores introduxerunt (quæ etiam honoraria appellatur) in judiciis frequentatur: nam ſecundum gradum dignitatis, vite quæ honeſtatem, creſcit aut minuitur æſtimatio injuriæ, qui gradus condemnationis & in ſervili perſona non immerito ſervatur: ut aliud in ſervo actore, aliud in mediis actus homine, aliud in viliffimo vel compedito juſ æſtimationis conſtituatur.* Which Text holds forth, that not only *pæna talionis* propter membrum ruptum; but alſo the *pæna nummaria* 25 *æſſum* tor common Injuries and

those other Mults *pro offe fracto & dentibus excussis*, were gone in desuetude: and there remain'd no other Branch of the Law of Retaliation contain'd in the XII Tables, except what related to the Punishment of false Witnesses. The Text gives this Reason for abolishing the *pœna nummaria*, that they were enacted in *maxima veterum paupertate*; and though there be some Commentators who deny that the Romans were scarce of Money at the time; yet *Hottoman* proves it from *Plin. lib. 19. c. 3.* and *A. Gel. lib. 11. c. 1.* in which last we may read that the Romans pay'd all their Mults in Sheep and Oxen; and the Commentator in *usum Delphini* on that place N. 5. and on the *pœna 25 assium* in *A. Gel. lib. 20. c. 1. n. 7.* computes the 25 asses, *respondere Gallicis assibus circiter novem*; and therefore there was reason to abrogate those fixed Penalties which the insolent *L. Neracius* had contemn'd; as is mention'd before; and in their stead to introduce Arbitrary Punishments. But the Text doth not condescend on the cause why *Talio, propter membrum ruptum*, was abolished, and Arbitrary Punishment introduc'd in place of it, which had been Arbitrary before; for the very Ransom (whereof *S. Cæcilius* makes mention in his Defence of that Law, in the Analogical sense of it) was modified by the *Prætor, arbitrarie*; to make the Analogical proportion betwixt the Ransom and the Delict; but that which I take to have been the Reason why the *talio propter membrum ruptum* is said to have gone in desuetude, as well as the *pœna nummaria*; and Arbitrary punishment to have come equally in the room of both, is that the words in the Law *Talio Esto* were often detorted, by the Party injur'd, to a *Pythagorica* sense when he was malicious, or when the Quantity of the Ransom did not please him. Wherefore it might be thought convenient in progress of time, to suffer that Law to go altogether in desuetude, and to give Redress to the Parties injur'd, by another Remedy; and probably it was by the *actio utilis* arising *ex leg. Aquilia*, which, having at first been introduc'd as an additional Remedy; and having for many years so continued without Derogation from these Laws of the Tables, might thereafter become the sole Remedy, and so continue till the *actio injuriarum* succeeded.

158 We see now by the words of *Tribonian*, that the *Lex Talionis* of the XII Tab. was in desuetude, when the Institutions were published, which was *A. Ch. 533.* that being the precise Date of their Preface: and the words *Lex Talionis* are not to be found again in all the Text; but he doth not condescend at what time it went in desuetude and Arbitrary punishment succeeded; but *Tribonian* being the first that makes mention of its being in desuetude, its presum'd that the Change had been but a small time before, which being suppos'd, it follows that Analogical Retaliation had endured among the Romans 982 years or thereabout, these being the just years of the Interval betwixt the coming of the XII Tables to them *A. U. C. 302.* before Christ 449. and the foresaid year of Christ 533. in the which the Institutions were Published. And as the Conference betwixt *Phavorinus* and *S. Cæcilius* (*A. U. C. 894. A. Ch. 143*) wherein *S. Cæcilius* maintains Analogical Retaliation, proves the Existence of it, from the introducing of the Law till that year, *quia probatis extremis probatur medium*: Even so the Existence of it downwards, to a little before the Publishing of the Institutions, is to be presum'd, because no Alteration is prov'd, till *Tribonian* makes mention of it in this Text, saying, that it was gone in desuetude; and Arbitrary punishment had succeeded; meaning that some new Law, or Practice, had worn out these old Laws in whole, and had introduc'd Arbitrary Punishment for all the Degrees of the Crime; whereas by the old Law, only the quota of the Ransom *propter membrum ruptum* was left to the Arbitriment of the Judge; the Pecuniary punishments foresaid being stated and determined.

It being thus made appear that *Arbitrary Punishment* came in place of *pæna talionis*; it follows that *Mutilation* and *Demembration*, are now punishable *pæna injuriarum arbitraria* as other Injuries committed by privat Violence; for which the Law had stated no particular Punishment. *Clar. §. final. 2. 83. N. 4. Damband. prax. Crim. C. 102. N. 9.* [where he gives many Instances of privat Violence, and describes them in general to be such as are committed *sine armi.*] to which our Law and Practice agrees. *Mackenzie Inst. lib. 4. tit. 4.* where he particularly makes mention of *Mutilation*, among *Arbitrary Crimes*. And in his *Crim. tract. 1. art. 2. tit. 31.* he acknowledges the Crime of *Demembration* to be punishable by inflicting a Mulct, in as far as in the form of a Doom or Sentence he inserts the *Quota*: and in all the Criminal Registers we have no other but *Arbitrary punishment*, for *Mutilation* and *Demembration*.

And in regard the Nature of this *Arbitrary Punishment* is not commonly understood, and the very Name of it is ready to give Offence to some who may apprehend that an *Arbitrary Judge* may do what he pleases; and that neither of our learned Countrey men, *Skeen* or *Mackenzie*, have insisted on it; I shall therefore crave Liberty to describe the Power of an *Arbitrary Judge*; and the nature of *Arbitrary punishment*; for the Benefit of those who do not well understand it.

Arbitrary Punishment answers to *Arbitrary Crimes*. All Crimes are divided in Ordinary, (called *Legitima*, because the Law hath determined the Nature both of Crime and Punishment) such as *Lesemajesty*, *Homicide*, and other capital Crimes; and Extraordinary, or *Arbitrary*; in which the Law hath determined neither, but has left both, to the Arbitriment of the Judge; as in the case of *Forstallers* or *Dardanarii*, whom *Ulpian l. 6. ff. de extraord. Crim.* describes in these words, *Qui fructus suos equis pretiis vendere nollent, dum minores uberes proventus excedant.* This I name with respect to this present year of dearth and scarcity, and because it is the greatest of that kind, *Solomon* having told us *Prov. 11. 26.* *He that withholdeth Corn, the People shall curse him: but Blessings shall be upon the head of him that selleth it.* A further Description of this may be seen in our Author, *p. 1. tit. 23.* Other Crimes of this nature are set down *d. tit. ff. de extr. crim.* And by *Struvius* and others on that Title.

Anciently all Crimes and Punishments were determined by the Law; and therefore when a Criminal was condemned, the Sentence made mention of the Crime he was found guilty of, but not of the Punishment: The Law supposed the Punishment would be known, as soon as the Nature of the Crime was declar'd; *l. si preses 32. ff. de Pænis. l. Accusatorum 1. §. 4. ff. ad S. C. Turpil:* But as Matters of Fact are more numerous than could be foreseen or comprehended in Laws. *l. 10. §. 12 ff. de ll.* being almost infinit, as every one knows: Even so Punishments proper to these Matters of Fact, must be as numerous; and therefore the Lawgiver behov'd to give *Arbitrary Power* to the Judge for determining in those Emergencies, by the Rules of Equity, and to heighten or diminish the Punishment, as the Circumstances of the Fact require: And this is call'd *Arbitrary punishment*.

All these, to wit, the ancient and modern Custom, and the nature of this Punishment are briefly held forth by *Ulpian in l. 13. ff. de pænis, Hodie* (says he, implying a former Custom and a Change) *licere ei, qui extra ordinem de Crimine cognoscit, quam vult sententiam ferre, vel graviolem vel leviolem, ita tamen ut in utroque moderationem non excedat.* And because the Judge, in so doing, supplies Defects in the Law, and yet does it by the Rules of Law and Equity: he is therefore called *Legis Auxilium.* *Eguin. Baro de divid. et individ. cap. 4. N. 4.*

56 *Of Mutilation and Demimbration,*

- 164 From what we have said its evident, how justly Punishment in general (as it includes Ordinary, and Extraordinary or Arbitrary) is defin'd by an anonymous German in his Book, entituled *Jus Pandectarum Illustratum*, tit. de penis, to be; "a just Coercition or Restraining of certain Delicts or Crimes, according to their Measure and Merit, impos'd by Authority of Law, or its competent Judges, upon guilty persons condemned by a previous Sentence, to be inflicted, after the time allowed, by the Sentence, is elaps'd, and that for the utility of Government, and common Tranquillity of the People. Now ordinary punishment, is nothing but that Species which the Law, or Custom having force of Law imposeth, and hence is called Legal. Arbitrary is that which being imposed by no Law, Statute or Custom, is to be ordained by the Judge according to his Arbitriment; and is sometimes more, sometimes less according to Circumstances, Beckman medul. Justin. ff. de penis thes 6. 7. 8. and this is what Justinian says, dict. §. 7. inst. de injur. in these words, *secundum gradum dignitatis, vitæque honestatem, crescit aut minuitur æstimatio injuriæ*; And conform to this Skee in his treatise of Crimes and Judges in Criminal Causes, tit. 1. cap. 2. says, "Crimes are punished by a lawful Pain specially set down and prescribed by the Law, or the pain thereof is Arbitrary. Lawful Pains are Capital or Pecunial, or neither Capital nor Pecunial, but of another kind and sort. Arbitrary Crimes are, which have no certain prescribed pain; but are punished by the Kings will & Mercy. Where observe, Skee sets down the word *Mercy* for the words *pleasure* or *Arbitriment*, to hold forth that the King and his Judges should in Arbitrary Crimes incline rather to *Mercy* than *Rigour*, if the Cause will allow it.
- 165 For further clearing of the Nature of this Arbitrary Power; the Gloss. in l. fidei commissæ 11 §. quamquam 7. ad verb. Arbitrium, de legat. 3. and Menochius following it, lib. 1. de Arbitrar. qu. 6 n. 1. distinguish Arbitrium, in Plenum, & Regulatum; that is to say, absolute and limited. Plenum arbitrium (tull or absolute power) is that, whereby one acts according to his Appetite, and as he pleases. A Judge exercising such a Power, is called *Belua, & non Judex*; a furious Beast and not a Judge; Menoch. Proem. dict. lib. N. 5. Regulatum, is that whereby one acts according to the dictates of Reason and Equity, and with due Moderation. And this is the Power, wherey a Judge cognosces Arbitrariè; and Ulpian both expresses the Power and its Limitation; in dict. l. 13. to wit the Power, in these words *Qui extra ordinem de crimine cognoscit, quam vult sententiam ferre, graviorem vel levioerem*; and its Limitation, in these words, *ita tamen ut in utroque moderationem non excedat*.
- 166 Any man may use absolute Power in the Disposál of his Goods, & after what manner he pleases; that being the effect of Dominion which carries with it *jus utendi, vel abutendi*, except there be a restraint put on him for publick Good. Also, if a Legacy be left to be disposed of at the pleasure of the Heir, or with Condition, *Si volueris*, he may deliver or withhold it; but its not so when the Legacy is conferred in Arbitrium Heredis, or in words importing Arbitrium; this is evident by the words of Ulpian in dict. §. 7. *Quamquam autem (inquit) fidei commissum non debetur, Si volueris: tamen si ita scriptum fuerit, si fueris arbitratus, si putaveris, si utile tibi fuerit visum, vel videbitur: debebitur: non enim plenum arbitrium voluntatis Heredi dedit, sed quasi bono viro commissum relictum*. This Law shews a clear difference betwixt the conferring a thing in voluntatem & arbitrium.
- 167 An Arbitrary Judge is the same with the prudent and wise Judge that Cicero, in orat. pro Ant. Cluentio speaks of, *Sapientis Judicis est meminisse se hominem: cogitare sibi tantum, a populo esse permissum*; quantum com-

commissum, sit & creditum, [and its never to be thought that power is given to a Judge to do unjustly] & non solum sibi potestatem datam; verum etiam fidem habitam meminisse: posse, quem oderit absolvere: quem non oderit condemnare, & semper non quod ipse velit, sed quid Lex & Religio cogat, cogitare; a-nima dvertere, qua legeretur citetur, de quo reo cognoscat, quæ res in questione ver-setur. cum hæc sunt videnda, tum vero illud est hominis magni atque Sapientis cum illam, judicandi causa, tabellam sumpserit: non se putare esse solum: neque sibi quodcumque contempnerit, licere: sed habere in consilio legem, Religionem, E-quitatem, Fidem: Libidinem, Odium, Invidiam, Metum, Cupiditatesque om-nes amovere, maximeque existimare conscientiam mentis suæ quam a Deo acce-pimus: quæ à nobis divelli non potest, quæ si optimorum consiliorum & factorum testis in omni vita nobis erit: sine ullo metu, & summa cum honestate vivemus. And the same with Ulpian's vir bonus, whom Alexander Neapolitanus (or Alex. ab Alex. as he is commonly called) *Dier. genial. lib. 6. cap. 1. in fin. defines. Questioni autem (inquit) diures fuit quid virum bonum, quid civilem & politicum deceat. Viro enim bono hoc datur ut ubique sanctus, ubique castus, pius & integer sit: cujus ne erratum quidem minimum fuerit, ne dicam vitium. Qui nullo malo perterritus, nullâ calamitate victus fortunæ cedat, nihil expetat, nihil dicat, nihil faciat in vitâ, nisi summâ cum laude & dignitate, in nullâ re delin-quat, nullius reiponiteat, servetque fœdera humani generis ita inviolata in magnis minimisque rebus, ut ne minima quidem labe conscientia detineatur. Ci-vilem vero dixere hominem, qui legem judiciorumque metuens, quantum moribus legibusque tributum est, id tanto temperamento agit. ut quoad fieri possit, nihil per-peram, aut inconsulto admissurus sit: qui suâ providentiâ, Religione, fide quantum-que ratione provideri potuit, Republicæ & Civium salutis consulat, legibus pareat, patriam tueatur, &c.* Here we have the Qualities of an Arbitrary Judge, and if he be endued with such Qualities, his Arbitrary Power will not be terrifying; but the Author adds *Quem (scil. virum bonum & civilem) nos magis fingimus quàm invenimus.* Yet every one should endeavour to be such, and to deserve such Characters.

By what's said in these Characters, it appears in the general, that an Arbi-¹⁶⁸trary Judge can do nothing that's unjust to gratify or please any person whatso-ever of whatever Degree or Quality. Now let us more particularly consider from Texts of Law. 1. What he cannot do. 2. What he can and should do.

1. He cannot, without just Cause, augment or diminish a Punishment which ¹⁶⁹the Law has already determined. *l. si quis reum 4. ff. de custod. reor. Farin. qu. 17. de delict. & penis. n. 5. 6. & seqq.* and a general statute to Punish will not derogate from a special. *l. sancio 14. ff. de penis.* Nor in general can he alter any thing determined by Law; except upon circumstances where the Law allows an alteration; A case is look'd upon as determined, where either there is an express Law, or consequences drawn from Law by parity of Reason. *l. 11. 12. c. 13. ff. de ligib.* or by custome; for that hath the force of a Law, *l. 32. ff. de ll. to regulat Punishments. Farin. dist. 9. 17. n. 18.* and if he cannot alter a Punishment, but by permission of Law, he can far less condemn the innocent, or absolve the guilty. *l. decurionum. 12. §. 1. in fin. cod. de penis,* for both are abomination to the Lord, *Prov. 17. 15.*

2. He cannot totally remit a Punishment to gratify the People. *l. ad bestias 13, 170 ff. de pen.* especially after sentence is pronounced, *l. penam 15. c. cod.* & in many cases it's not safe, for them to remit, who have power to do it: because it's the Interest of the Publick that Crimes be Punished; that so wicked men may be Reclaimed. *l. si pena. 20. ff. de penis. & ibi Gothofrid. lit. E. l. si operis 14. C. cod.* and tranquillity be preserved. *Wesemb. n. 9. ff. d. lit. oderunt peccare boni*

boni virtutis honore, mali vero formidine pœne. It's a saying of St. Bernard. lib. 2. *de considerat: Impunitas incuria soboles, insolentiae mater, Rad x impudentiae, transgressionum nutritrix.* And questionless Cicero was in the right disputing against Calenus: His words (*Philippic 8.*) are *Ego nolo quemquam civem committere, ut morte multandus sit: tu, etiamsi commiserit, conservandum putas. In corpore si quid reliquo corpori noceat, ari ac sicari patimur: ut membrorum aliquod potius quam totum corpus intereat. Sic in Reipubl corpore, ut totum saluum sit, quicquid est pestiferum amputetur: dura vox, multa illa duri r, salvi sint improbi, scelerati, impii: deleantur innocentes honesti, boni, tota Respubl. ca.* "I would have no Citizen (*says Cicero*) desire to dy, but thou (*Calenus*) wouldst have none to dy though he deserv'd it. It is but Reason that as in the body natural we cut off an arm to save the whole, so in the Body politick we do the same that nothing remaine alive that will make the other dy. It's a hard sentence, it's true, but this is an harder; let the wicked be safe, and let the innocent, the good, the just men, the whole Common-wealth be destroyed. This is only applyed when punishment is absolutely necessary.

171 3. He cannot extend Punishment beyond merit, It would be a hard thing to amerciat a man in a vast Sum of Money for a peccadillo or small trifle; or even for a delinquency, which does not really deserve such a Punishment. And by the same Rule it would infer partiality to punish a great fault in a rich Man, by the only exacting of a Crown; But equality must be observed betwixt the Fault and the Punishment. *l. 16. ff. de pœnis, farin. de delict & pœnis. qu. 17. n. 9.* yea, he cannot Punish any man more severely than the Law will allow; though he should receive a command from the Prince. He must in this case, delay sentence till he acquaint his Prince, and in the mean time cause the delinquent to be sufficiently guarded and secured. *l. si vindicand. 20. cod. de pœnis.*

172 4. He cannot Punish one man for the fault of another, even albeit the innocent be nearly related to the guilty Person by blood, affinity or friendship. *l. si 20. l. Crimen 26. ff. de pœnis, l. sancimus 23. cod. ead.* yea though the innocent person should offer his life for the guilty, *quia nemo est Dominus membrorum suorum. l. liber homo. 23. ff. ad leg. Aquil.* This agrees with the Law of Moses, *Deut. 24. 26.* and to natural Reason; for punishment being an Act of Revenge, it must be inflicted upon the delinquent himself, seeing no man can be *alieni criminis successor; ut in d. l. 26.* For as Seneca says lib. 2. *de ira cap. 24. nihil iniquius quam aliquem heredem paterni odii fieri.* But yet we must here except the Crime of Treason concerning which see our Author *Crim. part. 1. tit. n. 22. supra* we must also except the Laws which impose pecuniary mulcts to be payed by Parents for their Children, and Masters for their Servants *de 69. Paul. 6. 1. 4.* with other Acts and Laws of the same nature, *de 10. n. 24. N. 136. l. 186. Clar. 3. in q. 86. n. 9.* where he says, it's the common opinion; but there must be a statute for it, and the delict must be proved, and the Punishment cannot exceed the Childs *legitima; n. 8. & 9. See Mathieu. lib. ff. de m. 18. cap. 4. N. 2.*

173 5. He should not give the Execution of a sentence beyond the ordinary time. *Corp. p. act. crim. 2. tit. 13. n. 2. & seq.* except in weighty Causes mentioned by him, *de 1. tit. 13. n. 2. & seq.* but he thereby give occasion to contri-

174 bution for the Delinquent's Satisfaction. *l. cum res 18. cod. de pœnis.* It is questiond among the Div. whether Arbitrary Punishments can reach ad *extremum*, and some are for the affirmative, others for the negative, see *de 3. Gues. de m. 1. 6. N. 1.* and many others cited by *Barb. de 1. tit. 13. n. 2. & seq.* where he lets down many *argum. in d. 1. 6. N. 1.* it may be or not be, but all agree that death can ne-

ver be inflicted, unless the atrocitie of the Crime deserve it; *farin. d. qu. 17. N. 35.* And so *Fachin. contravers. lib. 9. C. 45.* understands *l. sacularii 7. l. sunt quædam 9 ff. de extraord. Crim. l. 1. & 2. C. de his qui latron. occult. l. julia 17 §. hodie 3. ff. ad leg. jul. Repetun.* and thereby thinks he reconciles the contrary opinions: because *Arbitrium* is restricted in *l. 1. ff. de fur. l. alne. l. 1. expilatores. ff. de effraç.* on this Reason, that the Quality of the Crime required it should be Restricted: But we need not much insist to debate the Question, because our Author *Crim. traç. P. 2. tit. N. 4.* Expressly concludes by Arguments drawn from Acts of Parliament, that no mans life can be ever taken, without expresse Law; there he also cites *Chasenaus, Socinus* and a Decision of *Pappen.* I remit to the place where you may read his Arguments.

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There is the like necessity for Arbitrary Power in some civil Cases; as in what stated by *Veneleius, l. continuus 137. §. cum ita 2 de verb. oblig. viz.* a person at Rome promises to pay a Sum of Money at *Ephesus*, in *Asia*, and makes no mention of the day of payment: now the Rule in such indefinit Obligations is *in quibus dies non ponitur, præsentis die debetur. l. in omnibus 14. de Reg. Jur.* but *Veneleius* resolves better, that the time of payment be rather remitted to the Arbitriment of the Judge "who is to allow such a competent time as a diligent man might travel in to *Ephesus*, neither obliging him to travel Night and Day without regard to tempestuous Weather, neither yet allowing him to Loyter in such a manner as he might be thought worthy of Reproof, but so orders the matter with respect to his Age, Sex, Health, as he may have time to go to the place appointed; that is to say, such a time as others in his Condition are wont to perform the Journey in, and with this Provision, that if he by double diligence or by the happy occasion of a Ship shall arrive at *Ephesus* sooner than others by an ordinary Journey use to do, he shall instantly be obliged to pay quia in eo quod tempore atque facta finitum est, nullus est conjectura locus. These

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are the words of the Text, and none can be more clear to prove the necessity of such a regulated Arbitrary power we have described.

178 And yet for all this, it cannot be said the Judge is more favourable than the Law, or that he contravenes the Law, or departs from it; but rather that he is *Legis auxilium* as we said before, and a Preserver of the Law, because so the Law wills and disposes, not only by many particular Texts, but also by that general Rule, *Quod pœna est commensuranda delicto, de qua in l. sancimus 22. C. de pœnis*. And *Farin.* from all this lays it down for a general Rule, *N. 10. d. q.* that the Law has given the Judge a power, to augment, diminish, or change Punishments, according to the Qualities or Circumstances of the Delinquency. All this is fully proved, and the contrary Arguments solved by *Cariz. d. pract. crim. p. 3. qu. 142. N. 22.* who is so far from denying this Power to Judges, that he thinks all Punishments of whatsoever Crimes, to be now in the Arbitriment of the Judge according to Circumstances; and proves it. *N. seqq.* And this is agreeable to the words of *Aristotle lib. 5. ethic. C. 5. Judex debet esse clementior lege scripta, quando ejusdem legis & justitiæ ratio ita fert & patitur.* And holds, even albeith the Judge who is obliged to swear to the Observation of the Laws. *l. rem non novam 14. C. de judiciis.* has actually sworn to observe them, *Rom. in rubr. ff. de Arbitr. col. 5. ver. Item quia quamvis juraverit & Consil. 429.* cited by *Farin. d. q. N. 17.* And the Reasons are, that the Law it self gives this Arbitrary Power to a Judge, to exercise it as the Circumstances require; And in every Oath the Authority of Law and Equity is presumed to be excepted. *Arg. l. fin. ff. qui satisd. cog.* and an Oath takes not away common Law and Equity, *l. si ex falsis 42. C. de transact. & l. fin. C. de non num. pec.* And a Judge never incurs Perjury for receding from the words of the Laws upon just grounds, because he has power to recede in that case. *Arg. l. si hominem 30. ff. mandati. Farin. d. qu. 17. N. 17.*

179 But as the Law has given this power to a Judge to augment and diminish punishment in ordinarie, and to determine punishment in extraordinary Crimes, yet 1. Its not every Judge or Magistrat that has this power, but those of the highest degree; And inferior Magistrats must consult the Prince, specially after a Sentence is pronounced; *DD. in d. §. pœna gravior. Vivius in lib. Commun. opin. in verb. Judex ubicunq. Covarruv. Variar. Resolut. lib. 2. cap. 9. N. 3. Tyraquel. tract. de pœnis, in præfat. N. 22. Jul. Clarus in pract. crim. §. fin. quest. 58. versic. ulterius quero. N. 10.* 2 The Judge or Magistrat must in his Sentence express the Causes why he recedes from the ordinary punishment of Law; but some think it's sufficient that the Sentence bear in general, that he did it for Causes moving him thereto. *Clarus loc. cit. Vasquez. contrav. illust. C. 14. N. 5.* and this is according to the present practise of the Imperial Chamber, *Gail. de pac. pub. C. 9. N. 27.* 3. Then, he cannot proceed in contempt of the Law, but in all his proceedings, must have regard thereto. *Gail & Vasq. locis cit. Mynsing. cent. 2. observ. 50. & 54.* and to the circumstances of the case; but if *in dubio* he mistake the case and alter the Punishment without just cause, the Law presumes for him that he acted *ex justa causa*; this is also according to the practise of the Imperial Chamber, *Gail. d. Obs. N. 26.* where he cites *Felin. Rom. & Bart.* asserting it to be the practise else where.

180 The *DD.* condescend on many Circumstances for imposing or altering of punishments; but let us first consider those Seven; *Causa, Persona, Locus, Tempus, Qualitas, Quantitas, Eventus,* mentioned by *Cludius Saturninus in d. l. aut facta. 16. ff. de pœnis.*

181 1. As to the *Cause.* The *DD.* have written largely on it: but to be brief, the Judge is to consider with *Marcianus in l. perspicendum. 11. §. delinquitur*

tur 2: ff: de pæn. If the Delinquent acted *ex proposito, vel impetu, vel casu*, he gives this Example of the first, when one comes with a Company to perpetrate the Fact; of the second, when he falls a fighting in Drunkenness; of the third, when at Hunting he kills a Man by a Dart thrown at a wild Beast; to these add a fourth, to wit, *culpâ*, or Negligence. I only name them; for all of them are described by our Author *tit: Murder*; and certainly they make a great Alteration as to Punishment, even in the cases of Killing, *Mutilation* and *Demembration*, *Farin: de Homicid: qu: 119: N: 7.* 2. The Judge should consider if the Crime be *consummated* or *attempted* only; the last is not to be so severely punish'd as the first, as is clear by the case of an Arbitrary Crime stated *l: 1: in p: in: §: ult: de extraord. Crim. l: qui autem 3: ff: de l:is qui noi: infam. l: vulgaris 21: §: qui furti ff: de furtis*. Except in Treason *l: quisquis 5: c: ad leg: Jul: Majest. Paricide l: 1: in fin: ad leg: Pomp: de Paricid. et Arg: l: 6. eod.* Attempting to kill an Infant *l: si quis: 8: C: ad leg: Corn: de sicar: for* in this there is more Cruelty, than in attempting to kill a man. *Farin: de Homicid: qu: 119: N: 22.* And a Wife attempting or declaring her Intention to kill her Husband; *et à contrari: si forte mulier: 9: C: ad leg: Cornel: de sicar.* and this may be the Reason, that they live in a conjunct Society, and under mutual Trust. There be some other atrocious Crimes wherein *conatus* is to be punished, as if the Crime were consummated, *vid: Farin: de Homicid: qu: 124. N: 1: & seqq.* But in cases not so atrocious, *Conatus* is never equal'd to *Consummation*. 3. The Judge should consider if the Delinquent acted *of his own accord*, or *by command of another*; in the first case he is to be punish'd, and all the Laws above cited prove it. In the second case if the Crime was committed by a Servant at the Command of his Lord; or by a Pupil at the Command of his Tutor or Curator, and be not Atrocious the Punishment may be remitted, *l. adea. 157. in p: in. ff: de diver: Reg: jur.* the like when one acts by command of a Judge, *l: non videntur. 167. eod.* The like in a Soldier obeying his Officer whom he was oblig'd to obey; as in the case 2. Dec. 1641: *part 1: N: 86: supra, Jaredin against Edmonston*; in which Mutilation committed on a Deserter by one who was oblig'd to apprehend him was excused. The like generally holds in all cases, where one is oblig'd to obey, *l: is damnum: 169: ff: de Reg: jur.* And though the Crime be Atrocious, the Command of a Superior where there was no Obligation to obey, mitigates the Punishment. *l: Servus: 20: ff: de oblig: et act: l: Servus 8: Cap: ad leg: Jul: de vi p: bl: l: si Servus: 2: C: de sepulch: viol: l: qui cum uno. 4. §. qui filium. 11. ff: de re milit.* but does not liberate, and this agrees with *Carpe: pract: Crim: p: 1: qu: 4: N: 7: 8.* where he cites not only Texts of Law, but a Decision of the Supreme Court of Saxony: and with our Practique, for *March 1671.* it was found after a most contentious Debate, that two Boys, the youngest whereof was not twelve years of Age, should pass to the Knowledge of an Inquest for assisting in the Company of 15 Armed men sent by their Father to demolish an House in the time of a Storm, whereof the Pursuer was in Possession. These things I have the more insisted on, because they frequently occur as Excuses and Extenuations in Processes of Mutilation and Demembration.

2. The person (whether considered as *Agent* or *Patient*) makes a great Alteration in Punishment, *d: l: aut facta 16 §. Persona. 3: ff: de pæn.* Each may be considered under four Heads, *Sex, Age, State, Quality.* 1. As to the *Sex*; the Law deals more mildly with Women than with Men, on the account of their Infirmary both of Body and Mind, *l: si adulterium 38: §: 7. & 8: ff: ad leg: Jul: de adul: l: quisquis 5. §: ad filias 3: C: ad leg: Jul: Majest. l: Sacrilegii 6: ff: ad leg: Jul: peculat.* And when they are the persons injur'd, the Law punishes the Delinquent with the greater severity, because they are the less able to defend themselves; And therefore albeit Deformity in a man

occasion'd by Wounding or Mutilation doth not augment the Punishment. *Farin. de Homicid. in sp. 4: q: 119: N: 118.* yet the contrary is true when a Virgin is thereby deform'd, because in that case she needs greater Tocher or Portion. *Farin. loc. cit. de delict. Cap: 6: Rubric: de injur: N: 12. vers. addi tamen. Farin: d: quæst. N: 119.* 2. As to the Age; Albeit Minority does not procure Impunity, if the Delinquent be such as for Age may be *doli Capax*, *l. impunitas 7: C: de pænis. Mackenzie p. 1: tit: 1: N: 5:* yet Minority extenuates *Mackenzie loc. cit:* because of the imbecillity of Judgment, *l. si ex causa 9: §. nunc videndum. 2: l. auxilium 37: §: 1: ff: de minorib. vid: Carpz. pract: crim: p. 3. q: 143.* upon the Question how far Minority excuses or mitigates the Crime. And generally in *omnibus pœnibus judiciis & ætati & imprudentia succurritur. l. 108: ff: de Rex: jur: Tyraquel: de pœn: temper: Cas: 7: Menoch: de Arbitr: Cas. 329.* and therefore if a Minor should mutilat or wound his Neighbour, his Non-age would mitigat but not excuse the Mutilation, seeing it doth not excuse him in Homicide; but if one mutilats, wounds, or demembers a Minor, the Punishment may be augmented according as he is capable or less capable to defend himself. In like manner, regard is to be had to old and decrepit Persons when they commit the Injury, *l. 3: ff: de termin: mot. or receive it, l. si quis in grati 3: §: ignoscatur. 7: ff: de S. C. Sil: n. Tyraquel: d. tract. de pœn. Cas. 8: Menoch. cas. cit.* The Reason is they become weak in Judgment, like Children. *Carpz. pract. crim: p. 3. quæst. 144.* 3. The state and condition of the person makes an Alteration in Punishments; especially if they be corporal and ignominious. Slaves were more severely punished, than free Men, for the same Crime, *l. 1: 10: & l. 16: §: persona ff: de pœnis: l. capitalium. 28: §: non omnes. 2. cod. and Infamous more than Famous. d: l. 28: §: ult. 4.* As to the Quality; It's certain that if any man demember, mutilat or any ways Invade a Magistrat, Parent, or Person of Honour, he commits a greater Injury, and is more severely to be punish'd than if he had Invaded his Equal or an abject person, *d: l. 16: §: 3: ff: de pœn: l. ult: ff: cod: d: §: 7: & 9: inst. de injur.* But if a Magistrat or Person of Honour should commit these or the like Crimes against a person of lower Degree, he should not incur the same corporal Punishment. This we see in the Instance of the *Decuriones* who could not be condemned to the Mines, nor to be hang'd or burnt alive, *l. moris. 9. §. istæ fere sunt pœnæ. 11. ff. de pœn.* And the Emperour *Hadrian* would not allow them to be punished capitally unless for *Parricide. l. Divus 15: ff: cod. and their Children had the same privilege d: §: 11.* Neither could any person of Repute be punish'd with Fustigation, *d. l. 28. §. 2.* nor be sent to the Mines; §. 5. neither were Nobles to be punish'd by hanging, *Tyraquel: de nobilib: Cap. 20. N: 104. & 106. Covarr. Resol. lib. 20. cap: 9: de pœnis crim: eorumque modo. N. 34. & seqq.* nor to undergo ignominious Punishments, *Fulgos. Consil. 167.* But to compensate this, the pecuniary Punishment of a Nobleman went much higher, because of his Riches, *Covarr. dict. loc.*

183 3. The Place where the Crime is committed, makes the same Act to be Theft or Sacrilege, and to be punished with Death, or a less punishment, *d. l. 26. §. 4. ff. de pœn.* He that Mutilats or Wounds another in the Church, Theatre, Mercat-place, or in the presence of a Magistrat, is more Criminal than if he had done it in a privat place, *d. §. 9. inst. de injur.* And for the same cause, "its Treason to Strike, Hurt or Slay any person in the Parliament-house during the holding of the Parliament, or within the King's Inner-Chamber, or Chamber of Presence, the King for the time being within his Palace; or where the Lords of Session sit for Administration of Justice, at the time they are sitting, or within the Kings Privy Council House, the time of the Council sitting there; or in presence of his Majesty, where ever His Highness shall happen to be for the time. Act 175. Parl. 13. Ja. 6. Which Act also in other particulars makes the circumstances of Place,

to augment or diminish punishment. See also what we said concerning Amputation of the Hand, with respect to the Circumstance of Place. N. 154. *Supra*.

4. Time makes a difference betwixt a Diurnal and a nocturnal Thief. d. l. 16. §. 4. ff. de pœn. The first is punishable *pœnâ ordinariâ*, the last *pœnâ extraordinariâ*, l. 1. & 2. ff. de furib. balnear. and betwixt breakers of Prison in the night and in the day-time. l. 2. ff. de effractor. In like manner, a Delinquent who reiterats a Crime, is more severely punished than if he had been but once guilty. l. 3. C. de Episc. audient. l. Capitalium 28. §. solent quidam. 3. 8. Grassatores 10. & §. famosis. 15. ff. de pœnis. In this last Paragraph, Famous, or common Robbers are ordained to be hanged in the places where they most frequently transgressed, that others by beholding their punishments, might be deterred from committing the like Crimes, and the Friends and near Relations of these whom they had murdered or robbed, might be thereby comforted; In the above-cited case, 15. July 1642. Chynes against Mowat and Nevings, their Fynes, or pecuniary Mulcts were made greater than ordinary, because the Pannels had been guilty of the like Crimes before, as the Decision bears. Under this circumstance of Time, the DD. bring in long Imprisonment, taking off the Punishment of Banishment, in regard that Squalor Carceris, which deprives a Man of the use of Light and free Air, is of it self a punishment, l. omnes. 23. C. de pœnis. and likewise Banishment taking off the Infamy which accompanies a Crime deserving a pecuniary Mulct, in regard that Relegation is more severe than the other. l. quid ergo, 13. §. pœna gravior, ff. de his. qui not. infam. But Carpx. makes diutina in carceribus detentio, to be a Circumstance by it self, p. 3. qu. 149.

5. Quality of the Fact, (of the person we have spoken already) distinguishes atrocious from lesser Crimes. d. §. atrox. 9. inst. de injur. manifest Theft from not manifest; Expilators from Thieves; Tumults from contrived and designed Invasions; Petulancie from Violence, d. l. 16. §. 5. ff. de pœn. common Theft from peculat, which is a stealing or concealing of publick Money. l. 4. & 10. ff. ad leg. jul. peculat. & sacr. and from Sacriledge. l. 6. eod. which is a stealing of things dedicated to pious uses, and punishable with Death. l. 9. eod. And Demembration of an Eye from Demembration of a Finger, because the Eye is a more necessary Member than the other, and the Injury done to it should augment the punishment.

6. Quantity distinguishes Furtum ab Abigeo. d. l. 16: §: 7. It being a greater Crime to take away a whole Herd of Swine, which is Abigeum; than to take away one of them, which is Furtum: And it's a greater Crime to give many Wounds, than to give but one; and to Demember, than to Mutilat; and therefore the Punishment should be the greater.

7. Event encreases Crime and Punishment, d. l. 16: §: 8. It was a greater Crime to burn the Corns in Africa, which serv'd the Miners, than in some other Countries, because the want of Food obstructed the Work, and the great Profit that arose from it. And it's a les Crime to strike off the Hand of a single man wanting a Trade, and Family, than of an excellent Artificer, who by his Handy-work maintains and enriches himself, his Wife and Children: and the Delinquent ought to be the more severely punish'd, and to pay greater Damages in the last case, than in the other.

Damages are due by the Rules of natural Equity and Reason; and Farin: insp: 4: q: 114: N: 93: cites Marfil. to prove it, and also expostulating with Criminal Judges who content themselves to condemn the Man-slayer to die for the Crime; but decern no Damages to be pay'd to the persons injur'd. Further Farin. says, that where ever a Criminal Action arises ex Delicto, there also arises Adio in factum ad interesse. l. qui nomine 25: & l. Hodie 32. §: 1: ff. ad leg. Cornel. de fals. and that the Fisk should not carry away all the Goods

of the condemned Person, by vertue of the Confiscation, to the prejudice of the damnified Persons and their Heirs; and cites *Decis: Lucen: 62: N: 30.*

189 But then the main Question will be, how far the payment of Damages should extend? To clear this the D.D. distinguish them in *Intrinsic* and *Extrinsic*. *Intrinsic*, respect the Reward of Physicians and the Expense of the Cure: *Extrinsic*, respect the value of the lost Work, which the killed *mutilated* or *d. membered* Person might have gain'd, if the Crime had not been committed. Both these Damages ought to be pay'd, *l: qua actione 7: in prin: in those words quod minus ex operis, ff: ad leg: Aquil: which Law speaks expressly de vulnerante.* There is another excellent Text *in l: ex hac lege 3: ff: si quadrup: pauper: in these words, et operarum amissarum quasque amissurus quis esset: and another Text in l: fin: ff: de his qui effud: vel dejec: in these words, præterea operarum quibus caruit vel cariturus est.* Many other Texts are cited by *Farin: d: insp: q: 114. N: 95: & 96.* where he expressly states the case of Tradesmen, and concludes, that if a Nobleman who liv'd upon his Revenues, and not accustomed to work, be kill'd, nothing is due upon the account of Workmanship, or other extrinsic Damages, and that the same holds, when a man is killed or wounded that had no Trade. And further *N. N. 115, 116, 117.* he persists to prove the Obligation of Damages for lost Work and cessant Gain, even in the cases of *Debilitation, Mutilation, and prescinding of Members.*

190 This Obligation to pay Damages is founded upon a Divine Law, *Exod. 20. 18, 19. If men strive together, and one smite another with a stone or with his fist, and he die not but keepeth his bed: if he rise again, then shall he that smote him be quit: only he shall pay for the loss of his time; and shall cause him to be thoroughly healed.* Here is a Warrant both for *Extrinsic* and *Intrinsic* Damages; and we shew before how far the Jews decerned Damages by vertue of this Text.

191 The Modification of Damages is to be made at the Arbitriment of the Judge, *Menoeh: de Arbitr: lb: 2: cas: 122: N: 3.* (and in *N. 1.* he cites the foresaid Text in *Exodus* as its Foundation): In modifying, the Quality of the persons is to be considered, and an Oath *in litem* may be taken after Taxing, *Farin: d: insp: 4: N: 113:* if the Crime was committed *ex dolo*, and not otherwise. *N: 114: ibid.* Also the Judge may make use of skillful men to enquire into these Damages, *ibid:* where he cites *Salycet* and others; and the number of the injur'd persons Family is to be considered, not only as it consisted of Parents, Wife, Children and Servants, whom he was obliged to maintain: But also of Strangers who had their Entertainment by him, and could not otherwise maintain themselves, *Farin: d: insp: 4. q: 119. N: 105: 106.* Further, he thinks the Delinquent ought to pay all Damages which these in Society with him sustained by the Breach of that Society, *N: 106: ibid:* where he cites several Texts, and D.D. anent the matter of *Arbitrary* Punishment and Damages. If any one desires to be further satisfied, he may consult the Authors above cited, and particularly *Farin: and Tyraquel: locis cit. Ant. Matthæus ad lib: 48: ff: tit: 18: cap: 4.* And *Carpz: d. p: 3. q: 149.* where he adds other five Circumstances for mitigating Punishment. 1. A promise of Mitigation, to draw forth a Confession. 2. A spontaneous Confession. 3. Long Imprisonment. 4. The Intercession of a young Maid to obtain the Delinquent in Marriage. 5. The skillfulness of the Delinquent in some useful and eminent Art.

192 Having drawn out this Discourse to a greater length than I intended, I shall conclude with a few Considerations taken from the Law and Practique of this Kingdom. We shew before that *Mutilation* and *Demembration* are by the dayly Practice punish'd *Arbitrariè* by the Lords Commissioners of the Justiciary; who are in use to decern a Sum of Money to be payed by the Pannel or Delinquent

Delinquent to the Party injur'd, for all he can ask or crave, either for Dam-
nages or Punishment, except the Delinquency be very atrocious, and then they
also Imprison or banish the Delinquent: likewise, they modify a Fine to be
pay'd to the King, (especially if the Crime be *Demembration*) and the Delin-
quent finds Caution to satisfy the Damages and Fynes decern'd, or to go to
Prison till he pay: He is also Burthened to procure a Remission, and for that
effect the Pursuer is decern'd to give him a Letter of Slains. These things be-
ing dayly practis'd need no Confirmation, but if any one desires to see Proofs
he may read the following Decisions, 8. March 1685. where *Lermont* is fin'd
in 300 Merks to be pay'd to *Fowls*, for demembrating him of the Ring-Finger
of his left Hand, and his Goods Escheated to the King. 19. Feb. 1608. where
Duncan found guilty of mutilating *Davidson* Meal-maker, of two Fingers of
his left Hand, is decerned to pay the Expence of the Cure, and remitted to
Prison till he satisfie, and to obtain a Letter of Slains. 11. March 1631. *Scot*
found guilty of breaking *Crawfords* Leg, is decerned to pay 250 Merks to him,
he granting a Letter of Slains. And 15. Decemb. 1630. *Kennedy*, in *Maybole*
is decerned to pay 100 Merks to *Barclay* for the Cure of his Arm which he had
mutilat. And 15. July 1672. *Mowat* and *Neivings* pursued by *Cheyne* of *Val-
ley* and his Brother, for *Mutilation* and *Demembration*, were decerned to pay
a thousand Pounds to the Pursuers, and a Fyne to the King; and to procure a
Remission, as the Privy Council had recommended; as may be seen in the Crimi-
nal Registers, 29. July 1642. and 25. August following. But Damages are ne-
ver decerned, unless the Party injur'd pursue for them; and all this
is founded on an old Statute, Cap: 11: Stat: 2: Rob: 2. which likewise
prescribes a corporal Punishment, and the method of Pursuing; the words
are "If any man mutilate another, or Wounds or Beats him by forethought
"Fellony, and the Party griev'd pursues him before a Judge by Suit or Com-
"plaint, such Form and Order of Process shall be deduced and led against
"the Trespasser, as is ordained against a Man-slayer, until he compare at a pe-
"emptory day, and then he shall pass to the knowledge of an Assize; and
"if he be convict by the Assize, he shall Redeem his Life from the Judge or
"Major, and by the Consideration of the Judge he shall satisfie the Party les'd;
"And if he be not pursu'd by the Party les'd, he shall be Indicted for that
"Deed, and thole an Assize, at the Justice Air, without delay or excuse, & be-
"ing convict, shall Redeem his Life and Assyth the Party. The Foundation
of the Action for Damages lies in these words, which appoint the Party
les'd to be satisfy'd by the Consideration of the Judge, when the Party les'd is
Pursuer, and to be Assythed if the Delinquent be Indicted.

But the great Difficulty lyes in these words of the Statute, which ordains the
Delinquent *who mutilate or wounds another by forethought Fellony, to be pursued* 193
by the same manner of Proces as a Man-slayer is pursued, and if he be convict to
redeem his Life: which leads me to the last Punishment of *Mutilation* and
Demembration I promised to speak to, viz. If it be Capital? For the Words
HE SHALL REDEEM HIS LIFE, imply, that the Judge if he find cause,
may inflict Capital Punishment, if the Crime be committed by *forethought*
Fellony, which is the case of the Statute. The Grounds of this Difficulty, be-
side the words of the Statute, are 1. That *Skeen*, who in the Latine Copy of
the old Statutes has written learn'd Notes on them, passes this Statute without
any Observation, which holds forth that it appeared difficult to him, or other-
wise, that it plainly decreed that capital Punishment might be inflicted in the
case of the Statute. 2. There are divers later Laws, viz. Act 28. Parl. 3. Ja.
4. Act 118. Parl. 7. Ja. 5. Act 76. Parl. 6. and Act 3. Parl. 21. Ja. 6. which
rank the Crimes of *Mutilation* and *Demembration* with *Homicide* and other

66 *Of Mutilation and Demembration, &c.*

Capital Crimes, and ordain them to be pursu'd by the same form and manner of Process; which are the very words of King *Roberts* Statute. And none of these Statutes are rescinded by any posterior Law. 3. If Trespassers were not lyable to the pain of Death, but only to pecuniary Mulcts, they would not need Remissions, and yet by the above-cited Decisions it appears, that the Judges after they had decerned Damages to the Party injur'd, and Fines to the King, they decerned them to procure Remissions, and the Plaintiffe to consent thereto, by granting a Letter of Slaines. Moreover, upon the 17. of May 1610. *Keith*, pursued by *Lindsay* for *Demembration*, produced a Remission which he had obtained before the Pursuit, burdening him to assyth the Party, which shews that an Assythment is not sufficient to free the Party of further punishment. Lastly, There's a Letter from the King to the Privy Council recorded in the Journal Books, 14. Sept. 1608. recommending that *Henderson* for demembrating *Montgomery* of three Fingers of his left Hand might be banished, because it was not usual in this Nation to inflict the pain of Death for the Crime of *Demembration*. These words do imply that there was a Law for that Punishment, but it was gone in Desuetude: And these grounds of Doubt are considerable. But to me it seems that the Statute of King *Robert* was made only *ad terrorem* and to force a Ransome from the Delinquent, because it runs not in the Stile of a *peremptory and positive Statute*, but in words importing that the Life was in the Kings Will, and was to be redeemed by a Ransome at the Discretion of the Judge, and so it comes to the Sense which *S. Cæcilius* in his Conference with *Phavorinus* puts on the Law of Retaliation in the XII Tables; And it would have been very hard, after all Nations have rejected *strict Retaliation* to have punished *Demembration* with Death, unless the Crime were accompanied with such atrocious Circumstances, as might justly augment the punishment. We read in *Sirabo lib. 15.* that some *Indians* did both inflict *Retaliation* and *Death*; but *Grotius de jure B. & P. lib. 2. cap 20.* proves by many Testimonies that Christians, though they may justly demand Punishment, yet should incline to the meekest part. And the Law gives it for a Rule in *panalibus. l. factum. 155. §. 2. ff. de Reg. jur.* unless the Crime be very atrocious, and then Severity is necessary. *l. perspicendum 11. in prin. ff. de penis.*

F I N I S.
